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No. _____

Supreme Court, U.S.
FILED

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In The
Supreme Court of the United States

LAWRENCE PATRICK DAVIS,

Petitioner,

versus

TARRANT COUNTY, TEXAS; SHAREN WILSON, Honorable, in Individual and Official Capacity; WAYNE SALVANT, Honorable, in Individual and Official Capacity; ELIZABETH BERRY, Honorable, in Individual and Official Capacity; MIKE THOMAS, Honorable, in Individual and Official Capacity; MOLLEE WESTFALL, Honorable, in Individual and Official Capacity; EVERETT YOUNG, Honorable, in Individual and Official Capacity; SCOTT WISCH, Honorable, in Individual and Official Capacity; GEORGE GALLAGHER, Honorable, in Individual and Official Capacity; ROBERT K. GILL, Honorable, in Individual and Official Capacity; JAMES WILSON, Honorable, in Individual and Official Capacity; JEFF WALKER, Honorable, in Individual and Official Capacity,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. This Court has held that an applicant for admission to be included on a list of attorneys eligible to practice law before a court has, at a minimum, a property interest subject to due process in being admitted to the list. *Goldsmith v. U.S. Board of Tax Appeals*, 270 U.S. 117, 122-23, 46 S.Ct. 215, 70 L.Ed. 494 (1926).

   In this case, Petitioner, a licensed attorney, applied to be included on a list of attorneys eligible to receive felony court appointments and was denied admission. Petitioner requested a hearing. The judges did not respond. The judges then changed the application requiring attorneys to waive their *Goldsmith* property interest before their application would be considered. The question presented is whether the Fifth Circuit correctly held that a criminal defense attorney lacked standing to challenge the new policy because he never reapplied under the new application which required a written waiver of the property interest. There is a conflict between this Court and the United States Court of Appeals for the Fifth Circuit on this question.

2. This Court recently held that "[a]ttachment [of the Sixth Amendment right to counsel] occurs when the government has used the judicial machinery to signal a commitment to prosecute as spelled out in *Brewer* and *Jackson*." *Rothgery v. Gillespie County, Tex.*, ___ U.S. ___, 128 S.Ct. 2578, 2591, 171 L.Ed.2d 366 (2008) (alteration in original).

QUESTIONS PRESENTED – Continued

In this case, the Fifth Circuit held that "the appointment process must be viewed holistically" in providing the district judges judicial immunity in the denial of a criminal defense attorney's application to be included on a list of attorneys eligible to receive felony court appointments. The question presented is whether a screening committee comprised of judges for selecting attorneys to be included on a list of attorneys eligible to receive felony court appointments is entitled to judicial immunity where, as a matter of law, there is no case or controversy during the selection process that would entitle the judges to judicial immunity. There is a conflict between the United States Court of Appeals for the Second Circuit and the United States Court of Appeals for the Fifth Circuit on this question.

PARTIES TO THE PROCEEDING

The Petitioner is Lawrence Patrick Davis, the plaintiff and plaintiff-appellant in the courts below.

The Respondents are Tarrant County, Texas, Honorable Sharen Wilson, Honorable Wayne Salvant, Honorable Elizabeth Berry, Honorable Mike Thomas, Honorable Mollee Westfall, Honorable Everett Young, Honorable Scott Wisch, Honorable George Gallagher, Honorable Robert K. Gill, Honorable James Wilson, and Honorable Jeff Walker, the defendants and the defendants-appellees in the courts below.

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PETITION FOR A WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Petitioner Lawrence Patrick Davis respectfully prays that a writ of certiorari issue to review the final decision of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit (App. 1) is reported at 565 F.3d 214. The decision of the District Court is unreported; *Davis v. Tarrant County, Tex., et al.*, 2007 WL 4191964, No. 4:07-CV-444-A (N.D. Tex. Nov. 26, 2007). It is included as (App. 31).

JURISDICTION

The judgment of the Court of Appeals was entered on April 8, 2009. Petitioner's timely filed Petition for Panel Rehearing was denied on April 30, 2009. (App. 45). The Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of Article 26.04 of the Texas Code of Criminal Procedure following the 2001 amendment provides in relevant part:

> Procedures for Appointing Counsel
>
> (a) The judges of the county courts, statutory county courts, and district courts trying criminal cases in each county, by local rule, shall adopt and publish written countywide procedures for timely and fairly appointing counsel for an indigent defendant in the county arrested for or charged with a misdemeanor punishable by confinement or a felony. . . . A court shall appoint an attorney from a public appointment list using a system of rotation, unless the court appoints an attorney under [those subsections addressing the appointment of the public defender, the creation of a countywide alternative program, or a judge's ability to appoint a counsel from any county in the court's administrative judicial region]. The court shall appoint attorneys from among the next five names on the appointment list in the order in which the attorneys' names appear on the list, unless the court makes a finding of good cause on the record for appointing an attorney out of order. An attorney who is not appointed in the order in which the attorney's name appears on the list shall remain next in order on the list.

TEX. CODE CRIM. PROC. ANN. art. 26.04 (Vernon 2009).

The Fifth Amendment to the United States Constitution provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Fourteenth Amendment to the United States Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article III of the United States Constitution provides as follows:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different States; – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below.

On July 27, 2007, Petitioner sued Respondents for damages for denial of due process of law, deprivation of civil rights, conspiracy, and retaliation pursuant to 42 U.S.C. §§ 1983, 1985(3) & 1988, asserting that the establishment and implementation of the county policy for the appointment of counsel to represent indigent defendants and the denial of Petitioner's application violated the due process and equal protection clauses of the Fourteenth Amendment and the due process clause of the Fifth Amendment. Respondents filed motions to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure stating, *inter alia*, that absolute judicial immunity applies because the actions complained of by Petitioner were taken in each judge's judicial capacity and Petitioner has not alleged any violation of a protected "property" or "liberty" interest. Respondent Tarrant County, Texas, contends that Petitioner has not stated a claim against it because district judges act on behalf of the State of Texas and not the county where they are located.

The District Court delivered a memorandum opinion and order on November 26, 2007, granting the Respondents' motions to dismiss holding that defendant judges acted in a judicial capacity at all times relevant to Petitioner's cause of action, and that they acted on behalf of the State of Texas and not Tarrant County. The District Court did not address the protected property right or liberty interest or otherwise address any of the other arguments raised

by the Respondents in their respective motions to dismiss including standing. Petitioner timely gave his Notice of Appeal on November 28, 2007, to the United States Court of Appeals for the Fifth Circuit.

On November 5, 2008, oral argument was conducted before a panel consisting of Judge Benavides, Judge Southwick and Judge Haynes. On April 8, 2009, Judge Benavides delivered a published opinion for the panel affirming the district court's judgment. Petitioner's timely filed Petition for Panel Rehearing and Petition for Rehearing En Banc were denied on April 30, 2009.

B. Statement of Facts.

Petitioner graduated from law school at Texas Wesleyan University on June 28, 1996. Petitioner is and has been a licensed attorney to practice law in the State of Texas since May 3, 1996. Petitioner has been actively engaged in the practice of criminal defense exclusively on the state level since his admission to the State Bar of Texas. Petitioner's primary venue for his criminal practice has been in Fort Worth, Tarrant County, Texas practicing criminal defense in the Tarrant County Criminal District Courts. Petitioner has handled every type of case as lead counsel from Capital Murder-Death Penalty to Class C misdemeanor offenses. Petitioner also practices before the Texas Court of Appeals and the Texas Court of Criminal Appeals handling felony and misdemeanor appeals. Petitioner has been in good standing with the State Bar of Texas his entire

career. Petitioner is also a member of the Bar of the Supreme Court of the United States.

On or about June 1, 2005, Petitioner submitted the standard application form to the Tarrant County Criminal District Judges seeking felony court appointments.[1] (App. 47). On August 1, 2005, Petitioner's application was denied. (App. 53). On October 28, 2005, Petitioner, through his attorney, sent a letter to the judges inquiring as to their reasons for Petitioner's denial and requested a hearing. (App. 54). The judges did not respond.

On May 1, 2006, the Respondents' new policies for felony court appointment applicants became effective. (App. 61). Specifically, the Respondents enforced a policy in the Tarrant County District Courts Felony Court-Appointment Plan that "the *statutes* of the State of Texas provide for a *subjective* review of the qualifications of the attorneys applying for inclusion on the wheel" and that "[t]he establishment of this system of qualifications confers to no attorney a property interest in receiving felony court-appointments." (App. 64-65) (emphasis added). Said Plan was contrary to the specific language contained in Article 26.04(e), (2)(A)(ii) of the Texas Code of Criminal Procedure which states: "[T]he judges of the district courts trying felony cases in the county, by formal action shall specify the ***objective*** qualifications ***necessary for an attorney to be included on***

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[1] Appointments include both court appointments and appellate appointments under said application.

the list." TEX. CODE CRIM. PROC. ANN. art. 26.04(e), (2)(A)(ii) (Vernon 2009) (emphasis added). The judges also changed the application requiring applicants to acknowledge under oath that criminal defense attorneys no longer have a property interest in receiving felony court-appointments. (App. 86). The previous guidelines that were applicable when Petitioner applied did *not* include any of the aforementioned changes or restrictions. (App. 89).

On June 2, 2006, Petitioner's attorney again inquired as to the collective decision of the judges and requested a hearing. The judges again did not respond. On November 30, 2006, Petitioner submitted the standard application form for felony court appointments to the Dallas County Criminal District Judges seeking felony court appointments in Dallas County, Texas. Said application does not force criminal defense attorneys to waive any property interest in the appointment wheel and specifies the objective qualifications necessary for an attorney to be included on the list. (App. 99). On January 4, 2007, Petitioner was approved unanimously for all felony levels by the following seventeen (17) State District Judges for Dallas County, Texas:[2]

Judge Robert Burns
Criminal District Court No. 1

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[2] Curiously enough, it should be noted that the Fifth Circuit's opinion does not inform the reader that Davis was approved for the Felony Public Appointment List in Dallas County after submitting application for same.

Judge Don Adams
Criminal District Court No. 2

Judge Robert Francis
Criminal District Court No. 3

Judge John Creuzot
Criminal District Court No. 4

Judge Carter Thompson
Criminal District Court No. 5

Judge Jeanine Howard
Criminal District Court No. 6

Judge Mike Snipes
Criminal District Court No. 7

Judge Ernest White
194th Judicial District Court

Judge Fred Tinsley
195th Judicial District Court

Judge Lana Myers
203rd Judicial District Court

Judge Lena Levario
204th Judicial District Court

Judge Mark Stoltz
265th Judicial District Court

Judge Andy Chatham
282nd Judicial District Court

Judge Rick Magnis
283rd Judicial District Court

Judge Susan Hawk
291st Judicial District Court

Judge Larry Mitchell
292nd Judicial District Court

Judge Tracy Holmes
363rd Judicial District Court

Per the Dallas judges' collective decision, Petitioner currently handles cases for the indigent men and women incarcerated in the Dallas County Jail. Such legal representation has always been consistent with the highest standards of the time-honored profession of criminal defense and in accordance with State Bar Rules and the Texas Code of Criminal Procedure.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to rein in the district judges in Tarrant County, Texas, who have circumvented the purpose and spirit of the Texas Fair Defense Act ("FDA").[3] This Court must step in because the Fifth Circuit failed in its duty to control the courts under its charge. The 2001 FDA was "landmark" legislation that represented an "historic" change in the way Texas delivers indigent defense services. *See, e.g.*, Terry Brooks and Shubhangi Deoras, *Texas Enacts Landmark Reforms*, 16 Criminal Justice 56 (Fall 2001). With the FDA, the Texas Legislature sought to increase consistency and accountability in

[3] The "Fair Defense Act" is the popular name for all of the 2001 revisions to state statutes governing indigent defense. Texas Fair Defense Act, 77th Leg., R.S., ch. 906, 2001 Tex. Gen. Laws 906.

indigent defense policies and thus improve the quality of representation to poor people accused of crime. *Id.* The FDA was considered a "giant step" that laid "the groundwork for modernization of and uniformity among indigent defense systems in Texas' 254 counties." *Texas' New Approach to Indigent Defense*, 65 Tex. B.J. 967 (December 2002). The FDA gives counties, not individual judges, ultimate responsibility for local policies regulating the delivery of legal services to indigent criminal defendants. TEX. CODE CRIM. PROC. ANN. art. 26.04 (Vernon 2009). In writing the FDA, the Texas Legislature was concerned about the defense bar lacking independence *from* the judiciary, and that judges' power over appointments undermined indigent defense. In particular, there was a perception that judges appointed defense attorneys based on political "favoritism." Texas Appleseed Fair Defense Project, *Fair Defense Report* at 21 (December 2000).

The Fifth Circuit and the District Court disregarded the changes made by the FDA and found the challenged indigent defense policies are made only by defendant judges, and that these judges have judicial immunity. This was error. Because the FDA makes counties responsible for attorney appointment policies, Respondent Tarrant County is liable for the challenged policies. More importantly, the Fifth Circuit's opinion has weakened hard-fought changes in Texas' criminal justice system. The Fifth Circuit's opinion sets dangerous precedent for indigent defendants in the State of Texas in that it permits judges to exclude qualified attorneys from protecting the rights of indigent defendants and allows judges to enjoy the same unbridled discretion in court appointments

that they enjoyed prior to the passage of the FDA. Thus, this issue involves a substantial question of constitutional right which has not been, but should be, directly addressed by this Honorable Court.

In this case, the Fifth Circuit effectively redrafted the FDA by holding "the appointment process must be viewed holistically" and, thus, further promoting unbridled discretion by judges in the appointment of attorneys. The Fifth Circuit's decision intrudes into an area of law passed by the Texas Legislature in large part to control past abuses of appointing attorneys from the judges' "good ol' boys" network, this Court's ruling in *Goldsmith v. U.S. Board of Tax Appeals,* 270 U.S. 117, 46 S.Ct. 215, 70 L.Ed. 494 (1926), and a ruling on the same issue by the Second Circuit in *Mitchell v. Fishbein*, 377 F.3d 157 (2nd Cir. 2004). The conflict between the Second and Fifth Circuits exemplifies similar conflict and disarray on the same issue in some federal district and state courts. A ruling from this Court is needed to reconcile the split in the Circuits and end the confusion below.

I. The Fifth Circuit's Reasoning that Petitioner Lacked Standing to Challenge the 2006 Plan Conflicts with this Court's Decision in *Goldsmith* and the Fifth Circuit's Decision in *Okpalobi II*

In order to establish a case or controversy sufficient to give a federal court jurisdiction over his claims, a litigant must satisfy three criteria: first, he must show that he has suffered, or is about to suffer, an injury in fact; second, there must be a causal

connection between the injury and the conduct complained of; and, third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Okpalobi v. Foster*, 244 F.3d 405, 425 (5th Cir. 2001) ("*Okpalobi II*"), *citing*, *Lujan v. Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). It is well-founded that the Eleventh Amendment does not bar suits seeking declaratory relief against state officers. *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). The purpose of the Declaratory Judgment Act is to afford added remedy to one who is uncertain of his rights and who desires early adjudication thereof without having to wait until his adversary should decide to act at his peril in the interim. *See* 28 U.S.C. § 2201 ("any court of the United States, on the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration").

In the case at bar, Petitioner sought declaratory relief. A litigant challenging the validity of a state statute may bring suit against the official who is charged with the statute's enforcement only if the official has either enforced, or threatened to enforce, the statute against the litigant. *Okpalobi v. Foster*, 190 F.3d 337, 348-49 (5th Cir. 1999) ("*Okpalobi I*"). To meet this exception, the suit must allege that a state law or policy violated federal law, be brought against an individual in his official capacity as an agent of the state, and seek prospective declaratory or injunctive relief with respect to the law or policy at issue. *Okpalobi*, 190 F.3d at 343-44 (exercising jurisdiction

over claim for declaratory relief that Louisiana abortion statute exposed doctors to unavoidable and substantial civil liability and would impair and restrict their practice of medicine in Louisiana).

Petitioner agrees with Judge Higginbotham's statement in *Okpalobi II* that "the Declaratory Judgment Act . . . does not jettison traditional standing requirements." *Okpalobi*, 244 F.3d at 431 (Higginbotham, J., concurring). However, the Fifth Circuit erroneously concluded that the futility doctrine was applicable to Davis when Davis never argued or speculated that he would be rejected if he reapplied. What Davis argued was that the defendant judges had changed the application through the 2006 Plan forcing attorneys to acknowledge under oath that they have no property interest in receiving court appointments. If Davis would have signed and submitted the application, he would have waived his property interest subject to due process in being admitted to the Felony Public Appointment List. *See Goldsmith*, 270 U.S. at 123 (certified public accountant had property interest subject to due process in being admitted to a list of attorneys eligible to represent taxpayers before Board of Tax Appeals); U.S. CONST. amend. V; U.S. CONST. amend. XIV; *accord Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 242, 57 S.Ct. 461, 81 L.Ed. 617 (1937) ("Such a dispute is manifestly susceptible of judicial determination. It calls, not for an advisory opinion upon a hypothetical basis, but for an adjudication of present right upon established facts"). Even Judge Benavides

reminded Judge Haynes of *Goldsmith* at oral argument.

Thus, the Fifth Circuit's decision on standing as to the 2006 Plan conflicts with the sound reasoning of Judge Jolly's opinion in *Okpalobi II* and his dissenting opinion in *Okpalobi I* where the plaintiffs in that particular case could neither satisfy the three criteria required under *Lujan* for standing nor could they establish some connection requirement with enforcement of the statute for the *Young* exception to be applicable. In the case at bar, the Fifth Circuit's emphasis on speculation and futility for denying Davis standing is not supported by the record and, therefore, the Fifth Circuit's analysis is flawed and misguided. Davis followed the blueprint laid out in *Okpalobi II* and, thus, had standing to challenge the establishment and implementation of the 2006 Plan and the new application. U.S. CONST. art. III, § 2, cl. 1.

The defendant judges were "the final policymakers" of Tarrant County, Texas, for the adoption and publication of written countywide procedures for timely and fairly appointing counsel for criminal defendants charged with felony grade offenses. *Monell v. City of N.Y. Dept. of Soc. Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978); *Flores v. Cameron County, Tex.*, 92 F.3d 258, 265 (5th Cir. 1996) (holding juvenile probation board was county agency rather than arm of state so that county could be held liable for civil rights violation based on policy of the board). Only when the execution of a county's policies or its

customs deprives an individual of constitutional or federal rights, does liability under § 1983 result. *Monell*, 436 U.S. at 694. A single application of that policy can result in liability. *Oklahoma City v. Tuttle*, 471 U.S. 808, 822, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985). In summary, the Fifth Circuit's opinion gave no consideration to *Goldsmith* or its own case law governing standing or county liability. Thus, these considerations provide additional grounds to grant certiorari in this case.

II. The Fifth Circuit and the Second Circuit Are in Conflict on the Issue of Judicial Immunity

The Second Circuit recently determined that a state court screening committee's decision not to place an attorney on a list of attorneys eligible for criminal defense appointments was not shielded by judicial immunity. *Mitchell*, 377 F.3d at 157. The *Mitchell* Court's reasoning applies with equal force to this case. The plaintiff in *Mitchell*, Stephen T. Mitchell, was an African-American attorney accepting court appointments in the state of New York who applied for recertification to the local appointment list. *Id.* at 162. New York required that localities create a plan to appoint counsel for indigent criminal defendants and the City of New York responded, in relevant part, by creating a list of attorneys eligible to receive appointments. *Id.* at 160. Attorneys had to apply for recertification periodically to remain on the county appointment list. *Id.* at 161-62. Mitchell was

not recertified for placement on the list and the letter notifying him of the screening committee's decision did not specify a reason for his removal. *Id.* at 162.

Mitchell sued the members of the screening committee under 42 U.S.C. § 1983, alleging that he was removed from the list on the basis of race and in retaliation for his complaints of racial discrimination. *Id.* The District Court granted the defendants' 12(b)(6) motion to dismiss and the Second Circuit reversed. *Id.* at 174-75.

In analyzing the question of judicial immunity, the Second Circuit noted that the proper course is to "evaluate the challenged proceedings in light of the characteristics of the judicial process." *Id.* at 172 (internal citations and quotations omitted); *accord O'Neal v. Mississippi Bd. of Nursing*, 113 F.3d 62, 65 (5th Cir. 1997). Not all acts performed by judges are protected by immunity – "a judge is not immune from liability for nonjudicial actions." *Mireles v. Waco*, 502 U.S. 9, 11, 112 S.Ct. 286, 116 L.Ed.2d 9 (1991). Applying the *Cleavinger* factors, the *Mitchell* Court held that removal of counsel from the appointment list is not a judicial act and therefore the defendant judges were not entitled to immunity. *Cleavinger v. Saxner*, 474 U.S. 193, 201-02, 106 S.Ct. 496, 88 L.Ed.2d 507 (1985).

In the instant case, the Fifth Circuit conducted its analysis of judicial immunity based on *Mireles*. *Mireles*, however, was a per curiam, summary reversal,

and a summary disposition decided without briefing or oral argument. *Mireles*, 502 U.S. at 15 (Scalia, J., dissenting). The *Mireles* case cited *Cleavinger* with approval. *Id.* at 9. This Court's decisions in *Socialist Workers Party* and *Edelman* make clear that *Cleavinger* is better precedent. *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 180-81, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979); *Edelman v. Jordan*, 415 U.S. 651, 671, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). The *Cleavinger* factors[4] weigh heavily against a finding that the act of not admitting Petitioner to the appointment list was judicial as there were no safeguards in the process, no hearing, no right to a hearing, no right to present evidence, no right to an explanation of the decision, and no right of appeal. *Cleavinger*, 474 U.S. at 201-02. Nevertheless, the Fifth Circuit's decision still fails under *Mireles*.

Judicial immunity can only be defeated by showing that the judge's actions were of a non-judicial nature or that he or she acted in the complete absence of jurisdiction. *Mireles*, 502 U.S. at 11-12. In

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[4] (1) the need to assure that the individual [judge] can perform his functions without harassment or intimidation;

(2) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct;

(3) insulation from political influence;

(4) the importance of precedent;

(5) the adversary nature of the process; and

(6) the correctability of error on appeal.

deciding whether absolute judicial immunity applies, a court should consider the nature of the act taken, namely whether it is a function normally performed by a judge, and the expectations of the parties, namely whether they dealt with the judge in his judicial capacity. *Id.* at 12 (citing *Stump v. Sparkman*, 435 U.S. 349, 362, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978)). "[T]he relevant inquiry is the 'nature' and 'function' of the act, not the 'act itself.' In other words, [a court should] look to the particular act's relation to a general function normally performed by a judge. . . ." *Id.* at 13 (citation omitted).

To determine whether actions are taken in a judge's judicial capacity, the Fifth Circuit considers the following four factors to determine whether the judge's actions are judicial in nature:

> (1) whether the precise act complained of is a normal judicial function; (2) whether the acts occurred in the courtroom or appropriate adjunct spaces such as the judge's chambers; (3) whether the controversy centered around a case pending before the court; and (4) whether the acts arose directly out of a visit to the judge in his official capacity.

Ballard v. Wall, 413 F.3d 510, 515 (5th Cir. 2005).

The Fifth Circuit holds that "the appointment process must be viewed holistically" because "the selection of applicants for inclusion on the list and the actual appointment of attorneys in specific cases occur as part of an appointment process that cannot be

divided in a principled way into judicial and administrative acts." *Davis v. Tarrant County, Tex.*, 565 F.3d 214, 226 (5th Cir. 2009). This position is fundamentally flawed because it assumes that all criminal defendants are indigent. In Texas, it is well-founded that a judge has no duty to appoint counsel until the defendant shows he is indigent. *Spitzer v. State*, 809 S.W.2d 781, 782 (Tex. App. – Houston [14th Dist.] 1991, no pet.); *Gray v. Robinson*, 744 S.W.2d 604, 607 (Tex. Crim. App. 1988). Furthermore, Article 26.04(n) of the Texas Code of Criminal Procedure states:

> A defendant who requests a determination of indigency and appointment of counsel shall:
>
> (1) complete under oath a questionnaire concerning his financial resources;
>
> (2) respond under oath to an examination regarding his financial resources by the judge or magistrate responsible for determining whether the defendant is indigent; or
>
> (3) complete the questionnaire and respond to the judge or magistrate.

TEX. CODE CRIM. PROC. ANN. art. 26.04(n) (Vernon 2009).

More importantly, this Court recently held in *Rothgery v. Gillespie County, Tex.*, ___ U.S. ___, 128 S.Ct. 2578, 171 L.Ed.2d 366 (2008) that "[a]ttachment [of the Sixth Amendment right to counsel] occurs ***when the government has used the judicial machinery*** to signal a commitment to prosecute as

spelled out in *Brewer* and *Jackson*." *Id.* at 2591 (alteration in original) (emphasis added); U.S. CONST. amend. VI. Thus, the Fifth Circuit's conclusion that "the acts at issue in this case involve the performance of duties which are intimately connected to a judge's adjudicatory role, and are therefore judicial in nature" assumes that a case or controversy exists during the screening process of selecting attorneys for inclusion on the list. *Davis*, 565 F.3d at 226. *Rothgery* makes it clear that the **"judicial machinery"** cannot be at work as a matter of law during the screening process as there is no case or controversy. Even when attachment occurs for purposes of a defendant's right to counsel, Article 26.04 of the Texas Code of Criminal Procedure does not "come into play" until the judge or magistrate makes a judicial determination of indigency. TEX. CODE CRIM. PROC. ANN. art. 26.04(n) (Vernon 2009).

Thus, the Fifth Circuit's insistence that "the act of selecting applicants for inclusion on a rotating list of attorneys eligible for court appointments is inextricably linked to and cannot be separated from the act of appointing counsel in a particular case, which is clearly a judicial act . . . to be protected by judicial immunity," *Davis*, 565 F.3d at 226, is not supported by this Court's holding in *Rothgery* and the fundamental fact that a judge has no judicial duty under the FDA to appoint counsel until both attachment has occurred and an affirmative finding has been made by the judge that the defendant is indigent. In order to be entitled to judicial immunity under *Ballard* and *Mireles*, the judge must be engaged in acts that are

integrally related not simply to the judicial process in general but to a concrete judicial case or controversy. *Forrester v. White*, 484 U.S. 219, 228, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988); *Ex parte Virginia*, 100 U.S. (Otto) 339, 348, 25 L.Ed. 676 (1879). Under *Rothgery* and Article 26.04(n) of the Texas Code of Criminal Procedure, there can be no case or controversy as a matter of law during the screening process. *Accord Mitchell*, 377 F.3d at 174.

Review from this Court is now warranted to reconcile the conflicting views of the Fifth and Second Circuits regarding whether judicial immunity applies to the fair, unbiased selection of qualified attorneys for the poor, and to remove the confusion in the lower federal and state courts.

CONCLUSION[5] AND PRAYER

In short, the Fifth Circuit's opinion not only runs contrary to the purpose of the FDA, but essentially renders the landmark legislation meaningless. In the end, Walter Allen Rothgery not only had the right to an attorney as this Court recently held, but he had the right to an attorney like Stephen T. Mitchell and Lawrence Patrick Davis. For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit should be granted.

Respectfully submitted,

RICARDO DE LOS SANTOS
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(817) 558-3885
Attorney for Petitioner Davis

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[5] Man being what he is cannot safely be trusted with complete immunity from outward responsibility in depriving others of their rights. At least such is the conviction underlying our Bill of Rights. That a conclusion satisfies one's private conscious does not attest its reliability. The validity and moral authority of a conclusion largely depend on the mode by which it was reached. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.

Anti-Fascist Committee v. McGrath, 341 U.S. 123, 171-72, 71 S.Ct. 624, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring).

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 07-11223

LAWRENCE PATRICK DAVIS

Plaintiff-Appellant

v.

TARRANT COUNTY TEXAS; SHAREN WILSON, Honorable, in Individual and Official Capacity; WAYNE SALVANT, Honorable, in Individual and Official Capacity; ELIZABETH BERRY, Honorable, in Individual and Official Capacity; MIKE THOMAS, Honorable, in Individual and Official Capacity; MOLLEE WESTFALL, Honorable, in Individual and Official Capacity; EVERETT YOUNG, Honorable, in Individual and Official Capacity; SCOTT WISCH, Honorable, in Individual and Official Capacity; GEORGE GALLAGHER, Honorable, in Individual and Official Capacity; ROBERT K GILL, Honorable, in Individual and Official Capacity; JAMES WILSON, Honorable, in Individual and Official Capacity; JEFF WALKER, Honorable, in Individual and Official Capacity

Defendants-Appellees

Appeal from the United States District Court for the Northern District of Texas

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(Filed Apr. 8, 2009)

Before BENAVIDES, SOUTHWICK, and HAYNES, Circuit Judges.

FORTUNATO P. BENAVIDES, Circuit Judge:

Appellant Lawrence Patrick Davis, a criminal defense attorney who practices primarily in Tarrant County, Texas, filed this suit because the Tarrant County criminal district judges denied his application to be included on the list of attorneys eligible for court appointment in felony cases in Tarrant County, known as "the wheel." Davis sued the district judges hearing felony cases in Tarrant County and the presiding judge of the Eighth Judicial Administrative Region (collectively, the "defendant judges") in both their individual and official capacities, and Tarrant County, under 42 U.S.C. § 1983, asserting that the establishment and implementation of the county policy for the appointment of counsel to represent indigent defendants and the denial of his application violated the due process and equal protection clauses of the Fourteenth Amendment and the due process clause of the Fifth Amendment.

The district court granted the motions to dismiss filed by the defendant judges and Tarrant County on the grounds: (1) that the defendant judges were immune from suit in their individual capacities because they were acting in their judicial capacities when they established and implemented the appointment policy and denied Davis's application; (2) that the defendant judges were immune from suit in their official capacities under the Eleventh Amendment; and

(3) that Tarrant County was not liable as a matter of law because the defendant judges were acting on behalf of the state of Texas, not Tarrant County. The district court did not address the alternative grounds for dismissal raised in the motions to dismiss, including that Davis had failed to allege any violation of a protected property right or liberty interest and that the defendant judges were entitled to qualified and legislative immunity.

Davis appealed, arguing: (1) that the defendant judges' acts were not judicial in nature; (2) that the Eleventh Amendment did not bar his request for prospective declaratory relief; and (3) that Tarrant County was liable for the defendant judges' actions because the Texas Fair Defense Act, passed in 2001, makes the defendant judges county policymakers. An amicus brief was submitted by the Texas Fair Defense Project ("TFDP") in support of Davis's position that the defendant judges acted as county policymakers and that Tarrant County may be held liable for the defendant judges' actions in establishing and implementing the appointment policy.

For the reasons stated below, we AFFIRM.

I. Standard of Review

A district court's grant of a motion to dismiss is reviewed de novo, using the same standard as the district court. *See Frank v. Delta Airlines, Inc.*, 314 F.3d 195, 197 (5th Cir. 2002). In ruling on a motion to dismiss, a court "accepts all well-pleaded facts as

true, viewing them in the light most favorable to the plaintiff." *Reliable Consultants, Inc. v. Earle,* 517 F.3d 738, 742 (5th Cir. 2008). "To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must plead enough facts to state a claim to relief that is plausible on its face." *Id.* (internal quotations omitted).

II. Background

A. Davis's Application for Felony Court Appointments

On June 1, 2005, Davis submitted an application to be included on the Tarrant County felony court appointment wheel. His application was denied on August 1, 2005. On October 28, 2005, Davis's attorney sent a letter to the Tarrant County criminal district judges asking for an explanation of the denial and requesting a hearing. The judges did not respond to the letter. On June 2, 2006, Davis sent another letter to the judges asking for an explanation of the denial of his application and requesting a hearing. The judges did not respond to the second letter.

Davis alleges that the judges denied his application to be included on the felony court appointment wheel because he did not have good personal relationships with the judges, he was not part of the judges' "good ol' boys" network, and the judges were trying to exclude qualified attorneys from the wheel in order to increase the conviction rate and clear the criminal court's docket.

B. The Texas Fair Defense Act

In 2001, the Texas Fair Defense Act (the "Act") was passed. The Act substantially revised Article 26.04 of the Texas Code of Criminal Procedure, which governs the procedures for the appointment of counsel. Prior to January 1, 2002, when the Act went into effect, Article 26.04 provided that decisions regarding the appointment of counsel would be made by individual judges on a case-by-case basis. Article 26.04 stated:

> Court shall appoint counsel
>
> > (a) Whenever the court determines that a defendant charged with a felony or a misdemeanor punishable by imprisonment is indigent or that the interests of justice require representation of a defendant in a criminal proceeding, the court shall appoint one or more practicing attorneys to defend him. . . .

Tex. Code Crim. Pro. Ann. art. 26.04 (Vernon 1989).

The 2001 amendment established a much more detailed procedural regime for the appointment of counsel in criminal cases that requires judges in each county to establish standardized countywide procedures. The 2001 amendment provides that the countywide policy may be based on the establishment of a public appointment list, the appointment of a public defender, the creation of an "alternate program," or simply allowing judges to appoint attorneys from any county in the court's administrative judicial region.

The text of Article 26.04 following the 2001 amendment provides in relevant part:

> Procedures for Appointing Counsel
>
> (a) The judges of the county courts, statutory county courts, and district courts trying criminal cases in each county, by local rule, shall adopt and publish written countywide procedures for timely and fairly appointing counsel for an indigent defendant in the county arrested for or charged with a misdemeanor punishable by confinement or a felony. . . . A court shall appoint an attorney from a public appointment list using a system of rotation, unless the court appoints an attorney under [those subsections addressing the appointment of the public defender, the creation of a countywide alternative program, or a judge's ability to appoint a counsel from any county in the court's administrative judicial region]. The court shall appoint attorneys from among the next five names on the appointment list in the order in which the attorneys' names appear on the list, unless the court makes a finding of good cause on the record for appointing an attorney out of order. An attorney who is not appointed in the order in which the attorney's name appears on the list shall remain next in order on the list.

Tex. Code Crim. Pro. Ann. art. 26.04 (Vernon 2009). Article 26.04 sets out a number of requirements for the countywide procedures, such as that they authorize only the judges of the county courts, statutory

county courts, and district courts trying criminal cases in the county, or the judges' designee, to appoint counsel for indigent defendants in the county; that they ensure that appointments are allocated among qualified attorneys in a manner that is fair, neutral, and nondiscriminatory; and that the judges specify the objective qualifications necessary for an attorney to be included on the public appointment list. *Id.*

C. The Tarrant County Appointment Policies

In order to comply with the Texas Fair Defense Act, the judges of the Tarrant County criminal district courts published a set of guidelines for felony court appointments. The guidelines in effect at the time Davis applied for felony court appointments in Tarrant County in June 2005 stated that appointments were to be made from a rotating list of the names of eligible attorneys, arranged according to the chronological date of receipt of an approved application, and that an attorney was to receive one defendant per rotation on the appointment list. The guidelines set out mandatory general qualifications for attorneys who sought criminal court appointments. These qualifications appear to be mostly objective, e.g., being a member in good standing of the state bar who maintains a principal office in Tarrant County.[1]

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[1] The general qualifications also included having a functioning fax machine and email address and some means of

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On April 24, 2006, the Tarrant County criminal district court judges issued the Tarrant County District Courts Felony Court-Appointment Plan (the "Plan"), which superseded the existing guidelines for felony court appointments. The Plan was signed by Judges Sharen Wilson, Wayne Salvant, Elizabeth Berry, Mike Thomas, Bob Gill, Everett Young, James Wilson, Scott Wisch, and George Gallagher, and was approved by Jeff Walker, the Presiding Judge of the Eighth Administrative Judicial Region. The Plan provides that a qualified attorney will be appointed to each indigent defendant based on a rotating felony appointment wheel consisting of the names of qualified attorneys approved by a majority of the district judges hearing criminal cases, and that each qualified attorney will be appointed to represent one indigent defendant per rotation through the wheel. The Plan allows judges or their designees to deviate from the

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regularly receiving phone messages, filing a sworn application for appointments approved by the district judges with the Coordinator of Attorney Appointments, notifying the Coordinator of any matter that would disqualify the attorney from receiving appointments and filing an annual compliance update, and appearing in cases to which the attorney has been appointed and representing indigent clients that the attorney has been appointed to represent. The guidelines also imposed minimum qualifications for appointments in specific categories of cases, such as "State Jail Felony" and "Second and Third Degree Felony and Motion to Revoke or Adjudicate Community Supervision." These qualifications related to the number of cases in the relevant category that the attorney had been involved with, the number of years the attorney had been licensed to practice, and the attorney's board certifications and CLE training.

rotation system and appoint an attorney who is specifically qualified under the Plan on an ad hoc basis upon a finding of good cause to deviate from the rotation system.

The Plan, like the superseded guidelines, imposes mandatory general qualifications for attorneys seeking appointments. The Plan states: "A critical review of the quality of representation actually provided by attorneys applying to be on the wheel is a factor in providing high quality representation to indigent defendants. In addition to the objective criteria outlined herein, the statutes of the State of Texas provide for a subjective review of the qualifications of the attorneys applying for inclusion on the wheel. . . . The establishment of this system of qualifications confers to no attorney a property interest in receiving felony court-appointments." The specific qualifications required to receive appointments in certain categories of felony cases appear to be essentially identical to those in the superseded guidelines, but the Plan includes additional "objective" general qualifications to receive appointments, such as consistently demonstrating commitment to providing effective assistance of counsel and quality representation to criminal defendants; consistently demonstrating professionalism, proficiency, and reliability in representing criminal defendants and in dealing with the

courts and opposing counsel; and being of sound mind, as well as good moral and ethical character.[2]

III. Standing

Davis challenges both his rejection under the Tarrant County guidelines in effect at the time he applied for felony court appointments in June 2005 and the establishment and implementation of the 2006 Plan, which superseded the existing guidelines. The defendant judges contend that Davis lacks standing to bring a claim based on the adoption of the 2006 Plan because his application for inclusion on the Tarrant County felony court appointment wheel was submitted and denied under the superseded guidelines before the Plan was adopted in 2006, and he has failed to file another application.

The district court did not base its ruling on Davis's lack of standing to challenge the adoption of the Plan, but standing is a jurisdictional requirement and may be raised at any time. *See FW/PBS, Inc. v. Dallas,* 493 U.S. 215, 231 (1990). In order to satisfy the standing requirement of an "actual or imminent"

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[2] The additional "objective" qualifications also include: being familiar with Texas law; not having been sanctioned by a court for failure to appear or for any type of unprofessional or abusive conduct; maintaining a listing in the telephone directory; promptly responding to communications from the court; maintaining the capacity to access the court's electronic filing system; and promptly contacting individuals who the attorney has been appointed to represent.

injury, a plaintiff generally must submit to the challenged policy before pursuing an action to dispute it. *See, e.g., Moose Lodge No. 107 v. Irvis,* 407 U.S. 163, 166-71 (1972) (holding that plaintiff who had never applied for membership lacked standing to challenge fraternal organization's discriminatory membership policies); *Grant ex rel. Family Eldercare v. Gilbert,* 324 F.3d 383, 388 (5th Cir. 2003) (holding that plaintiff lacked standing to challenge waiver policy because he failed to apply for waiver services); *Madsen v. Boise State Univ.,* 976 F.2d 1219, 1221 (9th Cir. 1992) ("[A] plaintiff lacks standing to challenge a rule or policy to which he has not submitted himself by actually applying for the desired benefit."). However, strict adherence to this general rule may be excused when a policy's flat prohibition would render submission futile. *LeClerc v. Webb,* 419 F.3d 405, 413 (5th Cir. 2005) (citing *Ellison v. Connor,* 153 F.3d 247, 255 (5th Cir. 1998)).

Davis does not clearly articulate his response to the defendant judges' standing argument, but it appears that he speculates that his application would have been rejected if he had reapplied under the Plan due to his rejection under the superseded guidelines. Such speculation is not sufficient to show that applying under the Plan would have been futile. *See United Indus., Inc. v. Eimco Process Equip. Co.,* 61 F.3d 445, 449 (5th Cir. 1995) (holding that evidence of futility was insufficient because it amounted to nothing more than a pessimistic belief that it was not worth attempting to compete for a project); *Pucket v.*

Hot Springs School Dist. No. 23-2, 526 F.3d 1151, 1162 (8th Cir. 2008) (holding that plaintiffs lacked standing because "there was no allegation or evidence that a request by the plaintiffs to reinstate busing of Bethesda students after § 13-29-1.2 became effective would have been futile"); *cf. Ellison v. Connor,* 153 F.3d 247, 255 (5th Cir. 1998) (holding that it would have been futile for plaintiffs to apply for permits because they had been sent a letter specifically stating that the permits would be denied); *Moore v. U.S. Dep't of Agric.,* 993 F.2d 1222, 1222-1224 (5th Cir. 1993) (holding that white farmers did not have to complete an application to participate in a Farmers Home Administration program when the FMHA told them that the program was closed to whites); *Desert Outdoor Adver., Inc. v. City of Moreno Valley,* 103 F.3d 814, 818 (9th Cir. 1996) (holding that application for sign permits would be futile when city had sued plaintiffs to remove signs, and ordinance "flatly prohibited" the signs).

Davis has standing to challenge only his rejection under the Tarrant County guidelines in effect at the time he applied for felony court appointments in June 2005. He lacks standing to challenge the establishment and implementation of the 2006 Plan.

IV. Claims Against the Defendant Judges in their Individual Capacities

A. The Legal Standard for Judicial Immunity

A judge generally has absolute immunity from suits for damages. *Mireles v. Waco,* 502 U.S. 9, 9-10 (1991) (citations omitted). Judicial immunity is an immunity from suit, not just the ultimate assessment of damages. *Id.* at 11 (citing *Mitchell v. Forsyth,* 472 U.S. 511, 526 (1985)). The Court described the purposes served by judicial immunity in *Forrester v. White,* 484 U.S. 219 (1988):

> [T]he nature of the adjudicative function requires a judge frequently to disappoint some of the most intense and ungovernable desires that people can have. . . . If judges were personally liable for erroneous decisions, the resulting avalanche of suits, most of them frivolous but vexatious, would provide powerful incentives for judges to avoid rendering decisions likely to provoke such suits. The resulting timidity would be hard to detect or control, and it would manifestly detract from independent and impartial adjudication.

Id. at 226-27 (citation omitted).

There are only two circumstances under which judicial immunity may be overcome. "First, a judge is not immune from liability for nonjudicial actions, *i.e.*, actions not taken in the judge's judicial capacity." *Mireles,* 502 U.S. at 11 (citations omitted). "Second, a judge is not immune for actions, though judicial in

nature, taken in the complete absence of all jurisdiction." *Id.* (citations omitted). Allegations of bad faith or malice are not sufficient to overcome judicial immunity. *Id.*

"When applied to the paradigmatic judicial acts involved in resolving disputes between parties who have invoked the jurisdiction of a court, the doctrine of absolute judicial immunity has not been particularly controversial," but "attempting to draw the line between truly judicial acts, for which immunity is appropriate, and acts that simply happen to have been done by judges" has proven to be a more difficult task. *Forrester*, 484 U.S. at 227. In determining whether a particular act performed by a judge is entitled to absolute immunity, a court must draw a "distinction between judicial acts and the administrative, legislative, or executive functions that judges may on occasion be assigned by law to perform." *Id.*; *see also Huminski v. Corsones*, 396 F.3d 53, 75 (2d Cir. 2005) ("At the margins, it can be difficult to distinguish between those actions that are judicial, and which therefore receive immunity, and those that happen to have been performed by judges, but are administrative, legislative, or executive in nature." (citations omitted)). Although administrative decisions "may be essential to the very functioning of the

courts," such decisions have not been regarded as judicial acts.[3]

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[3] *See Forrester,* 484 U.S. at 229 (holding that a judge's demotion and discharge of a court employee were administrative acts not protected by judicial immunity); *In Ex parte Virginia,* 100 U.S. 339, 348 (1880) (holding that a judge's preparation of an annual list of individuals eligible to serve on grand juries was not a judicial act covered by judicial immunity); *Morrison v. Lipscomb,* 877 F.2d 463, 465-66 (6th Cir. 1989) (finding that a chief judge's declaration of a moratorium on the issuance of writs of restitution was an administrative, not judicial, act, because the moratorium was a general order not connected to any particular litigation that did not alter the rights and liabilities of any parties and only instructed court personnel on how to process the petitions made to the court, and that immunity did not apply); *McMillan v. Svetanoff,* 793 F.2d 149, 155 (7th Cir. 1986) ("Hiring and firing of employees is typically an administrative task. . . . The decision to fire the plaintiff did not involve judicial discretion; in other words, the judge did not utilize his education, training, and experience in the law to decide whether or not to retain plaintiff. The administrative act of firing the plaintiff will not assist the judge in interpreting the law or exercising judicial discretion in the resolution of disputes."); *Goodwin v. Circuit Court,* 729 F.2d 541, 549 (8th Cir. 1984) (county judge's decision to transfer hearing officer not "official judicial act" but rather "administrative personnel decision"); *Lynch v. Johnson,* 420 F.2d 818, 820 (6th Cir. 1970) (holding that county judge was not performing a judicial act when, while serving ex officio as the presiding officer of a county "fiscal court," the judge forcibly removed and jailed a member of the fiscal court because it was not an "ordinary judicial tribunal" and instead could best be characterized as a body through which the "affairs of the county are managed" with powers that are "legislative and administrative" in nature); *Lewis v. Blackburn,* 555 F. Supp. 713, 723 (W.D.N.C. 1983) (holding that a judge's appointment of magistrates is a ministerial act), *rev'd on other grounds,* 759 F.2d 1171 (4th Cir. 1985); *see also Supreme Court*

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"[W]hether an act by a judge is a 'judicial' one relate[s] to the nature of the act itself, *i.e.*, whether it is a function normally performed by a judge, and to the expectations of the parties, *i.e.*, whether they dealt with the judge in his judicial capacity." *Mireles*, 502 U.S. at 12 (quoting *Stump v. Sparkman*, 435 U.S. 349, 362 (1978)) (internal quotation marks omitted). "[T]he relevant inquiry is the 'nature' and 'function' of the act, not the 'act itself.' In other words, [a court should] look to the particular act's relation to a general function normally performed by a judge. . . ." *Id.* at 13 (citation omitted). This circuit has adopted a four-factor test for determining whether a judge's actions were judicial in nature: (1) whether the precise act complained of is a normal judicial function; (2) whether the acts occurred in the courtroom or appropriate adjunct spaces such as the judge's chambers; (3) whether the controversy centered around a case pending before the court; and (4) whether the acts arose directly out of a visit to the judge in his official capacity.[4] *Ballard v. Wall*, 413 F.3d 510, 515

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of Va. v. Consumers Union of U.S., Inc., 446 U.S. 719, 731 (1980) (holding that the Supreme Court of Virginia was acting in a legislative, not a judicial, capacity when it issued a Bar Code governing the actions of attorneys, because "propounding the Code was not an act of adjudication but one of rulemaking"); *Richardson v. Koshiba*, 693 F.2d 911, 914 (9th Cir. 1982) (screening decisions by judicial selection panel comprised of judges involve "executive" acts).

[4] Amicus argues that this court should apply the six-factor standard set out in *Cleavinger v. Saxner*, 474 U.S. 193, 201-02 (1985) (citing *Butz v. Economou*, 438 U.S. 478, 512 (1978)), for

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(5th Cir. 2005) (citing *Malina v. Gonzales*, 994 F.2d 1121, 1125 (5th Cir. 1993)). These factors are broadly construed in favor of immunity. *Id.* (citing *Malina*, 994 F.2d at 1125).

B. Analysis

The district court found that the defendant judges' acts were judicial because the appointment of counsel is a judicial act. The appointment of counsel for indigent defendants in criminal cases is a normal judicial function. *See, e.g., Birch v. Mazander*, 678 F.2d 754, 756 (8th Cir. 1982) ("[T]he acts complained of consist of the acceptance of a plea and the appointment of counsel. Clearly, these are functions normally performed by a judge."); *Davis v. State of N.Y.*, No. 90 Civ. 6170 (MBM), 1991 WL 156351, at *2 (S.D.N.Y. Aug. 6, 1991) ("The appointment of counsel is a judicial act." (citations omitted)); *Edwards v. Hare*, 682 F. Supp. 1528, 1531-33 (D. Utah 1988) (refusing to distinguish between the clearly judicial

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whether an actor's role is analogous to that of a judge. That test is used to determine whether a nonjudicial actor's conduct is entitled to quasi-judicial immunity. Although there are some obvious parallels between the inquiries into whether the acts of a judge and the acts of a public official who is not a judge are "judicial" in nature, these are distinct inquiries. *See, e.g., Mireles*, 502 U.S. at 11; *Forrester*, 484 U.S. at 227; *Ballard*, 413 F.3d at 515. Nonetheless, in light of the parallels between the underlying nature of the inquiries, the analysis in quasi-judicial immunity cases may prove persuasive in the traditional judicial immunity context, as discussed in greater detail below.

act of determining that a particular defendant has the right to court-appointed counsel and the process of connecting an indigent criminal defendant with a court-appointed attorney – the "mechanics" of obtaining counsel); *Lewis v. County of Lehigh,* 516 F. Supp. 1369, 1370-71 (E.D. Pa. 1981) ("The judges' involvement . . . constitutes solely the exercise of their judicial functions – appointing attorneys to represent indigent defendants. . . ."). However, the alleged wrongful act in this case does not concern the appointment of counsel in a specific suit by the judge presiding over that suit, but rather the selection of applicants for inclusion on a rotating list of applicants eligible for court appointments pursuant to a countywide policy.

The advocates on both sides of this issue find some support for their positions in the case law. Several courts have specifically held that a judge's acts in creating and implementing a plan or policy for the appointment of counsel, and not simply the appointment of counsel in a particular case, are judicial in nature. In *Hawkins v. Walvoord,* 25 S.W.3d 882 (Tex. App. 2000), the court held that (1) judges' ratification of a plan that required attorneys to either accept court appointments to represent indigent criminal defendants or pay a yearly fee and (2) judges' appointment of an attorney under that plan, were judicial acts entitled to absolute judicial immunity. *Id.* at 891. Similarly, in *Roth v. King,* 449 F.3d 1272 (D.C. Cir. 2006), the D.C. Circuit held that judges acted in a judicial capacity in creating a family-court attorney panel system and selecting attorneys for inclusion on

a panel. *Id.* at 1286-87. In *Roth,* the chief judge of the Superior Court of the District of Columbia issued an administrative order creating a committee to recommend panels of designated and approved attorneys to represent indigent parties. *Id.* at 1277. Prior to the creation of the committee, superior court judges appointed counsel from a list of volunteers who had not been subjected to any sort of screening process. *Id.* Based on applications submitted by attorneys and evaluations submitted by superior court judges, the committee issued a report that recommended a list of attorneys for inclusion on the panels. *Id.* at 1277-78. The chief judge issued an administrative order establishing the attorney panels in accordance with the committee's recommendations. *Id.* at 1278. The D.C. Circuit found that the creation of the panel system and the selection of attorneys for inclusion on the panels were judicial, not administrative, acts, and were protected by judicial immunity. *Id.* at 1286-87.

In a recent unpublished opinion on judicial immunity, *Dunn v. Kennedy,* No. 07-50548, 2008 WL 162855 (5th Cir. Jan. 17, 2008), this court held that a judge's decision to remove an attorney from a court appointment list was a judicial act. *Id.* at *1. The *Dunn* court based its holding in part on the fact that "the governing Texas statute 'authorize[s] only the judges,' or the judges' designee, to appoint counsel for indigent defendants in the county and to adopt and publish written procedures for the timely and fair appointment of counsel," *id.* (quoting Tex. Code Crim. Pro. Ann. art. 26.04 (Vernon 2006)), and that "the

appointment of counsel to represent indigent defendants is a function normally performed by a judge acting in his judicial capacity," *id.* (citing *Roth,* 449 F.3d at 1286-87; *Hawkins,* 25 S.W.3d at 891). The *Dunn* court also based its holding on the fact that there was no allegation that the judge made the decision to remove the attorney anywhere other than in the courthouse building, that the decision centered around a case pending in court inasmuch as the attorney's removal was based on his conduct stemming from his representation of indigent defendants before the court, and that the decision arose from a visit to the judge in her official capacity, as the attorney's practice before the court and submission of payment vouchers were all directed toward the judge in her official capacity. *Id.* (citing *Ballard,* 413 F.3d at 515-18).

There is also authority supporting the proposition that decisions regarding which attorneys to include on a court appointment list, as opposed to decisions regarding appointment in a particular case, are administrative, not judicial, in nature. In *Mitchell v. Fishbein,* 377 F.3d 157, 174 (2d Cir. 2004), the Second Circuit was confronted with the question of whether a state-court screening committee's decision to remove an attorney from a panel of attorneys certified to serve as court-appointed counsel for indigent defendants was entitled to quasi-judicial absolute immunity. As the defendant judges point out, *Mitchell* concerned the issue of quasi-judicial absolute immunity – the doctrine under which a private actor may

be afforded the absolute immunity ordinarily accorded judges acting within the scope of their jurisdiction if the private actor's role is functionally comparable to that of a judge or if the private actor's acts are integrally related to an ongoing judicial proceeding – not judicial immunity. However, because "immunity is justified and defined by the *functions* it protects and serves, not by the person to whom it attaches," *Forrester,* 484 U.S. at 227, the *Mitchell* court's analysis of whether a nonjudicial actor's acts were judicial for the purpose of assessing quasi-judicial immunity cannot be said to be completely inapplicable to the immunity issue presented in the instant case, especially in light of the fact that *Mitchell* extensively cited judicial immunity cases in its analysis. In assessing whether the committee's decisions were integrally related to a judicial proceeding, the court drew heavily on several judicial immunity decisions:

> Functions that might be deemed integrally related to the judicial process when undertaken in the context of a particular case may be viewed as administrative when they are undertaken outside that context, and "[a]dministrative decisions, even though they may be essential to the very functioning of the courts, have not . . . been regarded as judicial acts," *Forrester v. White,* 484 U.S. 219, 228, 108 S. Ct. 538, 98 L.Ed.2d 555 (1988). For example, a judge has been held to have absolute immunity from a claim of conspiracy to empanel an all-white jury in a particular criminal trial, *see White v. Bloom,* 621 F.2d 276, 279-80 (8th Cir.), *cert. denied,*

449 U.S. 995, 101 S. Ct. 533, 66 L. Ed.2d 292 (1980), but to have no such immunity from a claim of racial discrimination in the preparation of general jury lists to affect all future trials, a job that was "ministerial," *see Ex parte Virginia*, 100 U.S. (10 Otto) 339, 348, 25 L. Ed. 676 (1879). In the latter case, the judge had the responsibility of "prepar[ing] annually a list of such inhabitants of the county . . . 'as he shall think well qualified to serve as jurors, being persons of sound judgment and free from legal exception,'" *id.* at 349 (Field, J., dissenting), a task that "might as well have been committed to a private person as to one holding the office of a judge," *id.* at 348 (majority opinion).

The Committee's job of formulating a list of attorneys deemed qualified to represent indigent defendants accused of crimes, and its additions to or deletions from that list, bear a marked similarity to the *Ex parte Virginia* judge's responsibility for compiling a list of qualified jurors. The Committee's decisions are not related to any particular criminal prosecution. The 18-B Panel exists so that judges may select attorneys from the list who will both provide future representation to indigent defendants and receive compensation for those services. But, as discussed above, in any given case, the court may appoint an attorney who is not on the 18-B Panel. Further, even the Committee's rejection of Mitchell's individual application did not affect any particular case, for the Committee's letter of rejection stated that

> Mitchell was to continue to "handle to conclusion" any matter to which he was then assigned.

Mitchell, 377 F.3d at 174. The *Mitchell* court viewed the act of formulating a list of attorneys deemed qualified to represent indigent defendants as an inherently administrative act, regardless of whether the actor was a judge or not. It analogized this act to the preparation of an annual list of individuals eligible to serve on grand juries, which the Supreme Court in *Ex Parte Virginia,* 100 U.S. 339 (1880), found not to be a judicial act entitled to judicial immunity when performed by a judge. The *Ex Parte Virginia* decision rested on the following reasoning:

> The duty of selecting jurors might as well have been committed to a private person as to one holding the office of a judge. It often is given to county commissioners, or supervisors, or assessors. In former times, the selection was made by the sheriff. In such cases, it surely is not a judicial act, in any such sense as is contended for here. It is merely a ministerial act, as much so as the act of a sheriff holding an execution, in determining upon what piece of property he will make a levy, or the act of a roadmaster in selecting laborers to work upon the roads. That the jurors are selected for a court makes no difference. So are court-criers, tipstaves, [and] sheriffs [ ]. Is their election or their appointment a judicial act?

Ex Parte Virginia, 100 U.S. at 348.

After considering the applicable legal standard, the authorities that support each of side of the immunity question in this case, and the underlying purpose of the judicial immunity doctrine, we believe that the act of selecting applicants for inclusion on a rotating list of attorneys eligible for court appointments is inextricably linked to and cannot be separated from the act of appointing counsel in a particular case, which is clearly a judicial act, and therefore that the judges' acts at issue in this suit must be considered to be protected by judicial immunity. We disagree with the *Mitchell* court that the act of selecting qualified attorneys for inclusion on an appointment list can be rigidly separated from the act of appointing an attorney in a particular case. The appointment process must be viewed holistically. In this case, the selection of applicants for inclusion on the list and the actual appointment of attorneys in specific cases occur as part of an appointment process that cannot be divided in a principled way into judicial and administrative acts. In light of the fact that the defendant judges have very limited discretion in deciding which attorney to appoint in a specific case – they may only deviate from the rotation system for good cause – decisions about which attorneys should be placed on the wheel functionally determine which attorney actually will be appointed in a particular case. Also, the nature of the decision of whether to select an applicant for inclusion on the appointment wheel and the decision of whether to appoint an attorney in a particular case are essentially identical; in both situations, the judge must assess an attorney's

competence and ability to effectively represent clients before the court. Although the selection decision is not made in the context of a specific suit, the decision will presumably be made based upon an attorneys' conduct in other cases before the court. Indeed, courts have not strictly limited judicial immunity to actions taken in the context of a specific lawsuit, and at least one court has found that acts taken completely outside the context of a specific adjudication are properly classified as judicial and protected by absolute judicial immunity. *See Sparks v. Character & Fitness Comm.*, 859 F.2d 428, 434 (6th Cir. 1988) (finding that actions taken by the Kentucky Supreme Court and its Committee on Character and Fitness in denying an applicant admission to the state bar were judicial acts to which absolute immunity applied). The Supreme Court has held that the related doctrine of prosecutorial immunity, which is justified by a similar rationale and governed by similar rules, may apply to acts made outside the context of a specific lawsuit when the acts are "directly connected with the conduct of a trial" and "necessarily require legal knowledge and the exercise of related discretion." *See Van De Kamp v. Goldstein*, 129 S. Ct. 855, 858-64 (2009) (holding that prosecutorial immunity barred suit against a district attorney and his chief assistant for failing to: (1) establish an information system containing potential impeachment material about informants to ensure that deputy district attorneys complied with their constitutional obligation to disclose agreements with informants who testify at trial; and (2) adequately train or supervise deputy district

attorneys concerning their obligation to disclose such information). Ultimately, the acts at issue in this case involve the performance of duties which are intimately connected to a judge's adjudicatory role, and are therefore judicial in nature.[5] *See Ballard,* 413 F.3d at 515.

The district court properly dismissed the claims against the defendant judges in their individual capacities.

V. Claims Against Tarrant County

The district court found that Davis had failed to state a claim against Tarrant County because the defendant judges acted on behalf of the state of Texas, not Tarrant County. Davis and the TFDP assert that the defendant judges acted on behalf of Tarrant County in selecting applicants for inclusion on the rotating list of attorneys eligible for felony court appointments in Tarrant County because they were policymakers for Tarrant County under the Texas Fair Defense Act.

Municipal liability under 42 U.S.C. § 1983 requires proof of (1) a policymaker; (2) an official policy; and (3) a violation of constitutional rights whose

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[5] The defendant judges clearly had jurisdiction to select applicants for inclusion on a rotating list because they were acting pursuant to an explicit statutory grant of authority in establishing and implementing a policy for the appointment of counsel in Tarrant County.

"moving force" is the policy or custom. *Rivera v. Houston Indep. Sch. Dist.*, 349 F.3d 244, 247 (5th Cir. 2003) (citing *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001)). The policymaker must have final policymaking authority. *Id.* (citing *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127, 108 (1988)). "[W]hether a particular official has final policymaking authority is a question of *state law*." *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989) (citation and internal quotation marks omitted). Municipal liability cannot be sustained under a theory of respondeat superior. *Rivera*, 349 F.3d at 247 (citing *Bd. of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 403 (1997); *Piotrowski*, 237 F.3d at 578). "[T]he unconstitutional conduct must be directly attributable to the municipality through some sort of official action or imprimatur; isolated unconstitutional actions by municipal employees will almost never trigger liability." *Piotrowski*, 237 F.3d at 578.

We have held that under Texas law, "[a] local judge acting in his or her judicial capacity is not considered a local government official whose actions are attributable to the county." *Krueger v. Reimer*, 66 F.3d 75, 77 (5th Cir. 1995) (citations omitted); *see also Clanton v. Harris County, Tex.*, 893 F.2d 757, 758 (5th Cir. 1990) ("Texas district judges act for the state in appointing counsel for indigent criminal defendants, and the county is not responsible under § 1983 for their actions in this regard."); *Hamill v. Wright*, 870 F.2d 1032, 1037 (5th Cir. 1989) (stating that "Texas law makes only state court judges responsible for

appointing attorneys for indigent criminal defendants" and "[a] county can exercise no authority over state court judges, as the latter are not county officials"); *Clark v. Tarrant County*, 798 F.2d 736, 744 (5th Cir. 1986) (stating that Texas district judges "are undeniably state elected officials"). As discussed above, the act of selecting applicants for inclusion on a rotating list of attorneys eligible for court appointments is inextricably linked to and cannot be separated from the act of appointing counsel in a particular case, which is clearly a judicial act under Texas law. *See Clanton*, 893 F.2d at 758; *Hamill*, 870 F.2d at 1037. Because the defendant judges acted in their judicial capacities in selecting applicants for inclusion on the rotating list of attorneys eligible for felony court appointments in Tarrant County pursuant to their obligations under the Texas Fair Defense Act, Tarrant County may not be held liable for those acts.

VI. Claims Against the Defendant Judges in their Official Capacities

The district court dismissed Davis's claims against the defendant judges in their official capacities on the ground of Eleventh Amendment immunity. Texas judges are entitled to Eleventh Amendment immunity for claims asserted against them in their official capacities as state actors. *Warnock v. Pecos County, Tex.*, 88 F.3d 341, 343 (5th Cir. 1996); *Holloway v. Walker*, 765 F.2d 517, 519 (5th Cir. 1985).

Davis has asserted a claim for prospective declaratory relief, and the Eleventh Amendment does not bar claims for prospective relief against state officials acting in their official capacity. *See Edelman v. Jordan,* 415 U.S. 651, 664 (1974); *Ex Parte Young,* 209 U.S. 123, 155-56 (1908); *Nelson v. Univ. of Tex. at Dallas,* 535 F.3d 318, 321-22 (5th Cir. 2008); *Brennan v. Stewart,* 834 F.2d 1248, 1252 (5th Cir. 1988). Davis's claim for prospective declaratory relief against the defendant judges in their official capacities is not barred by the Eleventh Amendment. However, Davis's claim for prospective declaratory relief is moot because the Tarrant County guidelines in effect at the time he applied for felony court appointments in June 2005 are no longer in effect, and Davis lacks standing to challenge the current policy.

VII. Conclusion

Davis has standing to challenge only his rejection under the Tarrant County guidelines in effect at the time he applied for felony court appointments in June 2005. His claims against the defendant judges in their individual capacities are barred by the doctrine of judicial immunity. Davis's claims against the defendant judges in their official capacities are barred by the Eleventh Amendment. Davis has failed to state a claim against Tarrant County because the defendant judges acted in their judicial capacities in selecting applicants for inclusion on the rotating list of attorneys eligible for felony court appointments in Tarrant

County. Accordingly, the judgment of the district court is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

LAWRENCE PATRICK DAVIS,	§	
Plaintiff,	§	
	§	
VS.	§	NO. 4:07-CV-444-A
TARRANT COUNTY, TEXAS,	§	
ET AL.,	§	
	§	
Defendants.	§	

MEMORANDUM OPINION
and
ORDER

(Filed Nov. 26, 2007)

Pending before the court are the motions of defendants, Tarrant County, Texas, the Honorable Sharen Wilson ("S. Wilson"), the Honorable Wayne Salvant ("Salvant"), the Honorable Elizabeth Berry ("Berry"), the Honorable Mike Thomas ("Thomas"), the Honorable Mollee Westfall ("Westfall"), the Honorable Everett Young ("Young"), the Honorable Scott Wisch ("Wisch"), the Honorable George Gallagher ("Gallagher"), the Honorable Robert K. Gill ("Gill"), the Honorable Jeff Walker ("Walker"), and the Honorable James Wilson ("J. Wilson") (hereinafter, all defendants except Tarrant County, Texas, collectively,

"defendant judges"[1]), to dismiss the above-captioned action for failure of plaintiff, Lawrence Patrick Davis, to state a claim upon which relief can be grated. Having reviewed the motions, plaintiff's responses, defendants' replies, the complaint, and applicable authorities, the court concludes that defendants' motions to dismiss should be granted for the reasons given herein.

I.

Allegations of Complaint

Plaintiff initiated the above-captioned action, through 42 U.S.C. § 1983, seeking "to vindicate the rights of Plaintiff guaranteed by the First, Fifth and Fourteenth Amendments to the United States Constitution." Compl. at 2. Specifically, plaintiff alleges that defendants conspired to: (1) deny plaintiff due process of law under the Fifth Amendment to the United States Constitution;[2] (2) deny plaintiff procedural due process, excluding him from the practice of law in violation of the Due Process clause of the Fourteenth Amendment; and (3) deny plaintiff procedural due

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[1] The defendant judges were sued in their individual and official capacities.

[2] Plaintiff has failed to properly state this claim because "[t]he Fifth Amendment applies only to violations of constitutional rights by the United States or a federal actor[,]" *Jones v. City of Jackson*, 203 F.3d 875, 880 (5th Cir. 2000), and plaintiff makes no allegation that any defendant was acting under the authority of the federal government.

process, excluding him from the practice of law in violation of the Equal Protection clause of the Fourteenth Amendment.

In support of such claims, plaintiff alleges that:

He has been a licensed attorney in the State of Texas since May 3, 1996. Since he became licensed, he has exclusively engaged in the defense of individuals charged with violations of state criminal law, and Tarrant County, Texas, has been the primary venue of his practice.

On March 9, 2005, plaintiff was trying a case in the 213th District Court, located in Tarrant County, Texas, Gill presiding. During this trial, plaintiff filed a motion for recusal because he felt that Gill could not be fair and impartial due to an "intimate relationship and friendship" plaintiff had participated in with Gill's wife before she and Gill were married. Compl. at 7. Gill refused to recuse, and the matter was referred to Walker, who denied the motion for recusal after an evidentiary hearing. On March 10, 2005, plaintiff filed a second motion for recusal, and Gill voluntarily recused. Walker then assigned S. Wilson to hear the remainder of the trial.

On or about June 1, 2005, plaintiff submitted an application to Tarrant County criminal district judges, seeking to be included on "the wheel," which is the rotating list of attorneys eligible for appointment in felony cases. Plaintiff's application was denied on August 1, 2005. Through counsel, plaintiff sent a letter to several Tarrant County judges that, *inter*

alia, requested a hearing on the denial of his application. The judges did not respond to plaintiff's letter.

In February of 2006, plaintiff was involved in the trial of Allen Christopher Roman ("Roman"), for attempted murder, in Criminal District Court Number 1, located in Tarrant County, Texas, S. Wilson presiding. Trial counsel for Roman in that case, Kathy Lowthorp ("Lowthorp"), retained plaintiff for the limited purpose of recusal of S. Wilson. Walker heard the motion for recusal but refused to recuse S. Wilson. In an article that ran in the *Fort Worth Star-Telegram,* plaintiff voiced his displeasure with this outcome and criticized Walker's handling of the matter. On April 27, 2006, Walker recused S. Wilson from Roman's remaining pending actions. During the recusal process, Lowthorp attempted to recuse Walker from hearing her motion for recusal of S. Wilson, and Walker held Lowthorp in contempt of court, fining her $1,000.00. Lowthorp retained plaintiff for the purpose of appealing Walker's finding of contempt.

On May 1, 2006, new policies for felony court appointment of counsel in Tarrant County, Texas, took effect. Such policies noted that the relevant Texas statutes provided for subjective review of the qualifications of the attorneys applying for inclusion on the wheel. The new policies further noted that the system of determining eligibility qualifications conferred no property interest in receiving felony court appointments, and the application for appointment was changed to require applicants to acknowledge

under oath that criminal defense attorneys have no property interest in receiving appointments.

On June 2, 2006, plaintiff, by and through counsel, sent another letter inquiring about the August 1, 2005, denial of his application for inclusion on the wheel, and he again requested a hearing. Again, the judges did not respond to plaintiff's letter. On November 30, 2006, plaintiff submitted an application for felony court appointments in Dallas County, Texas, and such application was approved. Plaintiff currently handles felony cases for indigent men and women charged in Dallas County, Texas, and he continues to practice law in Tarrant County, Texas, for his retained clients.

II.

The Motions to Dismiss

S. Wilson filed her motion to dismiss on September 28, 2007, plaintiff responded to such motion on October 5, 2007, and S. Wilson replied on October 11, 2007. Defendant Tarrant County, Texas, filed its motion to dismiss on October 22, 2007, plaintiff responded thereto on November 2, 2007, and Tarrant County, Texas, replied on November 16, 2007. Defendants Salvant, Berry, Thomas, Westfall, Young, Wisch, Gallagher, Gill, and J. Walker filed their motion to dismiss on November 5, 2007, and plaintiff responded on November 20, 2007. Wilson filed his motion to dismiss on November 16, 2007, and plaintiff responded on November 26, 2007.

Defendant judges argue, *inter alia,* that absolute immunity applies because the actions complained of were taken in each judge's judicial capacity. Tarrant County, Texas, contends that plaintiff has not asserted a claim against it because district judges act on behalf of the State of Texas, not the county where they are located. Since the court concludes that, at all times relevant to the above-captioned action, defendant judges were acting in a judicial capacity, and that they acted on behalf of the State of Texas, not Tarrant County, Texas, the court need not decide whether plaintiff has alleged any violation of a protected property right or liberty interest or otherwise address any of the other various arguments defendants have raised in their motions to dismiss.

III.

Standard of Review

The standards for deciding a motion to dismiss for failure to state a claim are well-settled. The court's task is to determine "not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974). In *Conley v. Gibson,* 355 U.S. 41 (1957), the Supreme Court said that a complaint "should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 355 U.S. at 45-46. However, the Supreme

Court has held that it did not quite mean its "no set of facts" statement in *Conley. Bell Atlantic Corp. v. Twombly,* 550 U.S. ___, 127 S. Ct. 1955, 1968-69 (2007) (stating that the *Conley* "no set of facts" statement "described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival," at 1969).

In evaluating whether the complaint states a viable claim, the court construes the allegations of the complaint favorably to the pleader. *Scheuer,* 416 U.S. at 236. However, the court does not accept conclusory allegations or unwarranted deductions of fact as true. *Bell Atlantic,* 127 S. Ct. at 1964-65 (stating that "[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, . . . a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." (citations, brackets, and quotation marks omitted)); *Tuchman v. DSC Commc'ns Corp.,* 14 F.3d 1061, 1067 (5th Cir. 1994); *Guidry v. Bank of LaPlace,* 954 F.2d 278, 281 (5th Cir. 1992). On a motion to dismiss for failure to state a claim, courts "are not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain,* 478 U.S. 265, 286 (1986).

IV.

Analysis

A. Defendant Judges' Judicial Immunity

Absolute immunity completely protects judges from suits for damages based on their performance of judicial functions. *Harlow v. Fitzgerald,* 457 U.S. 800, 807 (1982); *see Mireles v. Waco,* 502 U.S. 9, 11 (1991) ("Like other forms of official immunity, judicial immunity is an immunity from suit, not just from ultimate assessment of damages."). "The judge is absolutely immune for all judicial acts not performed in clear absence of all jurisdiction, however erroneous the act and however evil the motive." *Mitchell v. McBryde,* 944 F.2d 229, 230 (5th Cir. 1991) (quotation and citation omitted). *See also Pierson v. Ray,* 386 U.S. 547, 554 (1967) ("[I]mmunity applies even when the judge is accused of acting maliciously and corruptly[.]").

Judicial immunity is overcome in two sets of circumstances: "[1] a judge is not immune from liability for nonjudicial actions, i.e., actions not taken in the judge's judicial capacity[, and] . . . [2] a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction." *Mireles,* 502 U.S. at 11-12 (citation omitted). To determine whether actions are taken in a judge's judicial capacity, a court must consider the following four factors – broadly construed in favor of immunity – to determine whether the judge's action were judicial in nature:

> (1) whether the precise act complained of is a normal judicial function; (2) whether the acts occurred in the courtroom or appropriate adjunct spaces such as the judge's chambers; (3) whether the controversy centered around a case pending before the court; and (4) whether the acts arose directly out of a visit to the judge in his official capacity.

Ballard v. Wall, 413 F.3d 510, 515 (5th Cir. 2005).

Though plaintiff neither cites nor specifically addresses these factors, the first, whether defendant judges' actions constituted normal judicial functions, is the only factor seriously in contention in the instant action. Plaintiff would have the court hold that defendant judges' actions were not normal judicial functions because they were not "acts of adjudication." *See, e.g.,* Resp. to S. Wilson's Mot. at 14-16. Plaintiff has read the cases too narrowly; judicial immunity covers more than acts of pure adjudication. *See, e.g., Mireles,* 502 U.S. at 12-13 (holding that a judge was judicially immune from suit alleging judge ordered police officers to bring attorney before judge with use of excessive force); *Roth v. King,* 449 F.3d 1272, 1286-87 (D.C. Cir. 2006) (holding that judges had acted in a judicial, not administrative, capacity when they participated in the development and implementation of a system that limited attorney appointments to members of approved panels); *Sparks v. Character & Fitness Comm. of Ky.,* 859 F.2d 428, 431 (6th Cir. 1988) (holding, "[t]he act of considering

an application to the bar is a judicial act[,]" to which judicial immunity attached).

In *Mireles v. Waco,* 502 U.S. 9 (1991), the United States Supreme Court explained that, in considering judicial immunity, courts must "look to the particular act's relation to a general function normally performed by a judge[.]" *Id.* at 12-13. Judges normally appoint counsel for indigents charged with felonies, and have traditionally had the ability and discretion to decide whether – and which particular – counsel should be appointed. *See, e.g., Ex parte Epperson,* 153 Tex. Crim. 578, 223 S.W.2d 790 (1949). The current Texas statutory framework for appointment removes some of this discretion:

> The judges of the county courts, statutory county courts, and district courts trying criminal cases in each county, by local rule, shall adopt and publish written countywide procedures for timely and fairly appointing counsel for an indigent defendant in the county arrested for or charged with a misdemeanor punishable by confinement or a felony.

Tex. Code Crim. Proc. Ann. art. 26.04(a) (Vernon Supp. 2006). To deny defendants' motions to dismiss, the court would have to conclude that the appointment of counsel is not a judicial function because the Texas legislature has created standardized policies and procedures for appointment. However, at least one Texas case has held that appoint of counsel under the prior version of article 26.04 was a judicial act,

invoking immunity. *Hawkins v. Walvoord,* 25 S.W.3d 882, 891 (Tex.App. – El Paso 2000, pet. denied).

Plaintiff complains that defendant judges have erred in their conclusion that inclusion on the court-appointment list has a subjective component. However, the Texas statute clearly contemplates a subjective aspect. Article 26.04(d)(4) of the Texas Code of Criminal Procedure provides that the public appointment list shall contain the names of qualified attorneys, each of whom "is approved by a majority of the judges who established the appointment list under Subsection (e)."

The allegations in plaintiff's complaint support the conclusion that all defendant judges have done with respect to the above-captioned action is carry out the judicial functions required of them under the Texas Code of Criminal Procedure. Even if they had done so maliciously or corruptly, they would be entitled to judicial immunity for their actions. *See Pierson,* 386 U.S. at 554.[32]

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[2] Plaintiff's complaints seem to be based, at least in part, on personality conflicts with defendant judges. Such conflicts do not support relief under § 1983. *See Shinn v. Coll. Station Indep. Sch. Dist.,* 96 F.3d 783, 786 (5th Cir. 1996) ("[A] constitutional violation does not occur every time someone feels that they have been wronged or treated unfairly. There is no constitutional right to be free from emotional distress."); *Goldsmith v. Mayor and City Council of Baltimore,* 987 F.2d 1064, 1071 (4th Cir. 1993) ("Any other reading of [plaintiff's] proffered evidence effectively would transform what is no more than a personality conflict into a federal cause of action under section 1983. This

(Continued on following page)

B. Claims Against Other Entities

Plaintiff has sued each defendant judge in that judge's individual and official capacities. "Texas judges are entitled to Eleventh Amendment immunity for claims asserted against them in their official capacity." *Warnock v. Pecos County, Tex.*, 88 F.3d 341, 343 (5th Cir. 1996). Accordingly, in suing defendant judges in their official capacities, plaintiff has failed to state a claim upon which relief can be granted.

Plaintiff also names Tarrant County, Texas, as a defendant. A government will be held responsible in a § 1983 action when execution of the government's policy or custom inflicts the injury at issue. *Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658, 694 (1978). To establish municipal liability, a plaintiff must prove that there is: (1) a policymaker; (2) an official policy; and (3) a violation of constitutional rights whose moving force is the policy or custom. *Rivera v. Houston Indep. Sch. Dist.*, 349 F.3d 244, 247 (5th Cir. 2003).

Plaintiff's claims against Tarrant County, Texas, appear to be based only on the actions of defendant judges. However, "Texas law makes only state court judges responsible for appointing attorneys for indigent criminal defendants. A county can exercise no

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we decline to do."); *Crenshaw v. Herbert*, 445 F. Supp. 2d 301, 304 (W.D.N.Y. 2006) ("Even if defendants were motivated by some general dislike of plaintiff as a person, or by personality conflicts . . . , that would not give rise to a § 1983 claim.").

authority over state court judges, as the latter are not county officials." *Hamill v. Wright,* 870 F.2d 1032, 1037 (5th Cir. 1989). Furthermore, "Texas district judges act for the state in appointing counsel for indigent criminal defendants, and the county is not responsible under § 1983 for their actions in this regard." *Clanton v. Harris County, Tex.,* 893 F.2d 757, 758 (5th Cir. 1990).[43] *See also Holloway v. Walker,* 765 F.2d 517, 525 (5th Cir. 1985); *Florance v. Buchmeyer,* 500 F. Supp. 2d 618, 639 (N.D. Tex. 2007).

IV.

Order

For the reasons discussed above, the court concludes that defendants' motions to dismiss should be granted.

Therefore,

The court ORDERS that all claims asserted by plaintiff in the above-captioned action be, and are hereby dismissed.

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[3] While *Hamill v. Wright,* 870 F.2d 1032 (5th Cir. 1989), and *Clanton v. Harris County, Tex.,* 893 F.2d 757 (5th Cir. 1990), were decided before the current version of article 26.04 of the Texas Code of Criminal Procedure was enacted, the court concludes that nothing in the supervening amendments to article 26.04 alters the precedential value of these cases.

SIGNED November 26, 2007.

/s/ John McBryde
JOHN McBRYDE
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-11223

LAWRENCE PATRICK DAVIS

Plaintiff-Appellant

v.

TARRANT COUNTY TEXAS; SHAREN WILSON, Honorable, in Individual and Official Capacity; WAYNE SALVANT, Honorable, Individual and Official Capacity; ELIZABETH BERRY, Honorable, in Individual and Official Capacity; MIKE THOMAS, Honorable, in Individual and Official Capacity; MOLLEE WESTFALL, Honorable, in Individual and Official Capacity; EVERETT YOUNG, Honorable, in Individual and Official Capacity; SCOTT WISCH, Honorable, in Individual and Official Capacity; GEORGE GALLAGHER, Honorable, in Individual and Official Capacity; ROBERT K. GILL, Honorable, in Individual and Official Capacity; JAMES WILSON, Honorable, in Individual and Official Capacity; JEFF WALKER, Honorable, in Individual and Official Capacity

Defendants-Appellees

Appeal from the United States District Court
for the Northern District of Texas at Fort Worth

(Filed Apr. 30, 2009)

ON PETITION FOR REHEARING
AND REHEARING EN BANC

(Opinion ___, 5 Cir., ___, ___ F.3d ___)

Before BENAVIDES, SOUTHWICK, and HAYNES.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

EB-REHG4A

Application For Felony Public Appointments
Tarrant County Criminal District Courts

Last name: _____

First name: _____

State Bar Card #: _____

Date licensed to practice law: _____

Physical address (not a post office box): _____

_____

Mailing Address: _____

_____

Telephone #: _____

Fax #: _____

Pager #: _____

Cellular Phone #: _____

E-mail address: _____

Please Circle
Yes or no

Yes No 1. Are you currently in good standing with the State Bar of Texas?

Yes No 2. Are you currently under indictment or charged for a criminal offense other than class C traffic offenses?

Yes No 3. Are you certified by the Texas Board of Legal Specialization in criminal law?

Yes No 4. Are you a member of the State Bar College?

Yes No 5. Have you ever been sanctioned by the State Bar Grievance Committee or the Commission on Lawyer Discipline?

Yes No 6. Do you have an appeal pending of any State Bar sanction?

Yes No 7. Have you ever been sanctioned for failure to appear before a court?

Yes No 8. Has a court ever found that you have provided ineffective assistance of counsel?

Yes No 9. Have you ever been convicted or placed on deferred adjudication for any offense other than a class C offense?

_____ 10. What percentage of your practice is criminal law?

_____ 11. Approximately how many criminal cases have you tried to conclusion before a jury? (include hung juries, but exclude agreed competency hearings)

_____ 12. Of the trials in Question 11, how many were felony cases?

_____ 13. Of the trials in Question 12, how many were misdemeanor?

_____ 14. Approximately how many appeals have you pursued in which you authored the brief (excluding subcontracted briefs)?

Yes No 15. Do you have unique training or skill in mental health cases?

Yes No 16. Do you have training or skill as a deaf interpreter?

Yes No 17. Are you fluent in any other language other than English?
If so, please list. _____

_____

Yes No 18. Do you represent any municipality as a judge or attorney?
If so, please list. _____

_____

Yes No 19. Do you have any legal conflicts that would prohibit you from taking appointments?
If so, please state. _____

_____

Required Attachments

1. Your most recent reporting year CLE report from the State Bar of Texas.

2. If you have been sanctioned by the State Bar Grievance Committee or the Commission on Lawyer Discipline in the last 10 years, attach the decision(s) And, if desired, a written explanation.

3. If you have been sanctioned for failure to appear before a Court in the last 10 years, attach any applicable court documents and, if desired, a written explanation.

4. If a Court has found that you have provided ineffective assistance of counsel in the last 10 years, attach any applicable documents and, if desired, a written explanation.

5. If you have ever been convicted of or placed on deferred adjudication for any offense other than a class C traffic offense, attach copies of all final orders (or those deferring adjudication) and judgments.

6. If you are applying for appeals, list the appeals and case numbers in which you authored the briefs.

7. If you are applying for trial appointments, list the requisite trials, contested revocations and pleas of guilty by case name and number for the level at which you seek appointments.

Request for Appointments

I am applying to be considered for the following appointments: (check whatever apply)

_____ 1. State Jail Felony.

_____ 2. Second and Third Degree Felony and Petition to Revoke or Adjudicate Community Supervision.

_____ 3. First Degree Felony and Non Death Capital Murder and Extradition

_____ 4. Appeal and Post Judgment Writ.

_____ 5. Capital Murder – Death Penalty Sought.

Oath

I, _____ the undersigned attorney, hereby state under oath that all of the above information is correct, that I have read and understand the qualifications set out in the Tarrant County Felony Public Appointment Guidelines and that I meet those qualifications. I understand that I have a duty to promptly notify the Coordinator of Attorney Appointments (CAA) of any matter that may make me ineligible to receive appointments under the Tarrant County Felony Public Appointments Guidelines, and to notify the CAA, in writing, of any changes to the information contained in this application. I understand that I may be removed from the appointment list for failure to meet any qualification stated in the Tarrant County Felony Public Appointment Guidelines.

_____
Attorney

On this date personally appeared before me, who after being properly identified and placed under oath swore that all of the information stated on the forgoing Application For Felony Public Appointments is the truth.

Name: _____

Office of person taking oath: _____
Tarrant County, Texas

Oath may be administered by a criminal district court judge, criminal court clerk or notary public. Notary seal and date commission expires, if applicable.

On the _____ day of _____, 20___, the District Judges hearing criminal cases of Tarrant County, Texas, considered the foregoing application and it is hereby

___ approved, ___ denied. Comments: _____

_____

Judge

[SEAL]

TARRANT COUNTY
OFFICE OF
ATTORNEY APPOINTMENTS

HOLLY WEBB,
COORDINATOR
(817) 884-2369

GWYN CATES,
ASSISTANT COORDINATOR
(817) 884-2370

JUSTICE CENTER
401 W. BELKNAP
FORT WORTH, TX
76196-0201
FAX (817) 884-2371

August 1, 2005

Mr. L. Patrick Davis
Attorney at Law
201 E. Belknap #3D
Fort Worth, TX 76102

RE: Application for Felony Appointments

Dear Mr. Davis:

This is to inform you that your application for the Felony Appointment List was denied.

Sincerely,

/s/ Holly D. Webb
HOLLY D. WEBB
Coordinator of Attorney Appointments
Tarrant County, Texas

PETER A. LESSER
ATTORNEY AT LAW
2501 OAK LAWN AVENUE • SUITE 350
DALLAS, TEXAS 75219

214-630-3066
FAX 214-630-3068

BOARD CERTIFIED CRIMINAL LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

G. ANNIE EVANS
ATTORNEY AT LAW

October 28, 2005

Judge Sharon Wilson. Criminal District Court No. 1
Judge Wayne F. Salvant, Criminal District Court No. 2
Judge Elizabeth Berry, Criminal District Court No. 3
Judge Mike Thomas, Criminal District Court No. 4
Judge Robert K. Gill. 213th Judicial District Court
Judge Everett Young, 297th Judicial District Court
Judge James Wilson. 371st Judicial District Court
Judge Scott Wisch. 372nd Judicial District Court
Judge George Gallagher, 396th Judicial District Court
Tarrant County Justice Center
401 West Belknap Street
Fort Worth, TX 76196

Re L. Patrick Davis, Esq.

Dear Honorable Judges of the Tarrant County Criminal District Court Judiciary:

I am writing to you on behalf of attorney L. Patrick Davis, who on or about August 2, 2005 received a letter from the office of Holly D. Webb, Coordinator of Attorney Appointments, acting on behalf of all the Tarrant County felony district judges, informing him that he was not qualified to handle felony court appointed cases and that his application

for appointment to the felony public appointment list was being denied. Although the letter does not use that specific language, (ie. that he was not qualified to handle felony appointments) that is the only "permissibly legal" conclusion I can reach for such an action on the part of the judges. Any other reason would violate many federal and state constitutional provisions and statutes. For instance, if the action were based on his political affiliation, lack of political contributions to judges, personal animus from certain judges because of his style, religion, sex, age, etc., such an action by the district judges would be legally indefensible. Since you did not enunciate any objective reason for his being denied access to the felony appointment list, how is he to know what it is he needs to correct in order to 'pass muster' if he were to reapply?

The "collective" action taken either directly by you in consultation with each other or done so by subordinates reporting back to you and your brethren has a direct financial, ethical and legal effect upon Mr. Davis' practice. If he is unqualified to handle felony appointments, then he needs to know the basis for that conclusion. Does Mr. Davis have an ethical and legal obligation to his retained clients to file a Motion to Recuse in every case that he currently has pending in the district courts? Your action denying Mr. Davis's application to the felony public appointment list leads to the logical inference that any judge(s) who voted him not qualified may not be fair and impartial to his retained clients.

Does Mr. Davis have an obligation to inform his former clients that they may have a viable writ against him, for ineffective assistance of counsel, since a majority of the Tarrant County District Judges have decided that he is not competent to handle any felony appointments? Does Mr. Davis have an obligation to inform those clients that as of August 1, 2005 (the date of your letter), the Tarrant County felony district judges have deemed him not qualified to be a court appointed attorney? As a zealous attorney, does he (or do you as judges with the ethical and legal responsibility to ensure that only qualified attorneys practice in your courts) need to recommend to those defendants to that they file motions to remove counsel on grounds of ineffective assistance of counsel or should zealous counsel remain silent and in the event of a conviction, then disclose the judges' action, to preserve an excellent appellate point? Is Mr. Davis obligated to inform his malpractice carrier of your action, since he now has knowledge of the collective decision of the Tarrant County Criminal District Judges that he is not qualified to do felony appointments? To inform them will probably cause an increase in his malpractice insurance premium. Does Mr. Davis have to list all of his felony cases, past and current, as potential causes of action? Does Mr. Davis have to inform the State Bar of this action as it could lead to possible grievances?

Several other questions about your action are equally puzzling. Was this action taken by closed ballot, after an open discussion? Surely lawyers,

who are being reviewed for participation on the Felony Public Appointment List, which is funded with public monies, are entitled to fair consideration which takes into account their education, abilities, training, grievance background (if any) as well as any other "reasonable" standards that require objective analysis and which prevent a subjective "blackballing" by judges who may not like a particulars attorneys's style or success rate. Since an attorney has to complete a form which makes him/her list prior jury trials, appeals, CLE, grievances, etc. to qualify to be on the appointment list, the denial of participation on said list must be on an objective level, or else the entire purpose of the legislatively mandated reforms is subject to circumvention and a return 'to the good old boy' system is inevitable. The grounds for removal from the list are very specific as are the grounds for be approved for the list. A simple letter from the coordinator of attorney appointments, acting on behalf of the district judges, denying an attorney acceptance onto the felony public appointment list, without an explanation as to where the attorney has failed to measure up, gives the attorney less notice than an indictment does a criminal defendant. Surely, a bill of particulars is the least that an affected attorney is entitled to receive from the district judges.

The collective actions of the district judges with respect to Mr. Davis (and I'm sure to other attorneys similarly situated) has had the unintended effect of a taking without due process being afforded to the affected attorneys. Surely attorneys should have the

same rights as other citizens. At the very least, the denial of an attorney's application to the felony public appointment list should not take place without some type of hearing before a panel of the district judges. Due process demands nothing less. The action to deny an attorney from the list defames that attorney's reputation and can have a direct tortious effect upon his/her ability to make a living. It appears that on its face, the current system requires an objective standard for an attorney applicant to be placed on the list, but in actuality it remains the same subjective system that existed in Tarrant County (and elsewhere in Texas) before the mandated changes of the 2001 State Legislative Session. Appointment to the felony public appointment list has degenerated to a popularity vote. I ask that the judges review their action against Mr. Davis and if the collective judgement is to keep him off the list, an explanation be given as to why, or in the absence of such an explanation, a hearing be convened where such information can be ascertained.

As we are all aware, individuals in the jail foster a deep mistrust in the jail of court appointed attorneys. As this controversy leaks out to the press, which is inevitable, public confidence in this system will further erode. As this knowledge circulates among the county jail residents, the writ writers will leap on your action as another avenue to further muck up the system. In a similar vein, this action by the judges will also have the effect of increasing grievance filings against other attorneys affected by your order. This,

in turn requires a written response by the affected attorney regardless of how frivolous the allegation may be. Failure of an attorney to respond is a separate grievance. In the current atmosphere, all grievances proceed to hearing, thereby requiring the attorney to appear and answer any additional questions the committee may pose. This creates a tremendous unavoidable time burden for those attorneys.

At the current time, I am only representing Mr. Davis in this matter, although I don't doubt that there are other similarly affected Tarrant County criminal defense attorneys who have been victimized in a similar fashion. I feel confident that as this matter becomes common knowledge throughout the criminal defense community, other obviously qualified attorneys will come forward with equally inexplicable reasons for why they were denied or possibly removed from the felony public appointment list. I fail to see how that set of circumstances could advance the quality of justice in the Tarrant County Courthouse. The lack of objective reasons, could suggest to those wanting to believe it, more malevolent motives for this action. As an attorney who has always respected the integrity of the Tarrant County Criminal District Court Judiciary, this is a very disappointing moment. We went through similar problems in Dallas County in the Spring and Summer of 2003, which were solved without the necessity of any public or legal action by the affected attorneys who in that case were being

removed in much the same way that Mr. Davis is being denied access in Tarrant County.

Sincerely,

/s/ Peter A. Lesser
Peter A. Lesser

PAL/pl
encl.

Cc: Ms. Holly D. Webb,
Coordinator of Attorney Appointments
L. Patrick Davis Esq.

Effective 5/1/06

TARRANT COUNTY DISTRICT COURTS
FELONY COURT-APPOINTMENT PLAN

I. PREAMBLE

The district judges hearing criminal cases in Tarrant County, Texas, are committed to timely providing quality legal representation to indigent criminal defendants, to guaranteeing fair and neutral procedures for attorney selection, and to establishing minimum competency standards for court-appointed attorneys; while at the same time ensuring that public funds are wisely spent. In administering the Tarrant County District Courts Felony Court-Appointment Plan (hereinafter the "Plan"), the district judges seek to comply with applicable provisions of the *Texas Code of Criminal Procedure* as well as the *Texas Code of Judicial Conduct*. This Plan supersedes all other plans and guidelines promulgated by the Tarrant County district judges hearing criminal cases.

II. ADMINISTRATION OF THE PLAN

The district judges hearing criminal cases in Tarrant County will administer the Plan in accordance with the rules set out herein.

The district judges expect that attorneys appointed to represent indigent defendants will continuously adhere to the rules of the Plan.

The district judges have created an Office Of Attorney Appointments (OAA), and within the OAA

employ a Coordinator of Attorney Appointments (CAA) and staff to administer the Plan.

The district judges also employ a magistrate and financial investigation officers (FIOs) to interview arrested persons and collect detailed financial information from those who request appointment of counsel.

Counsel will be appointed in death penalty cases pursuant to the most recent Eighth Administrative Judicial Region plan promulgated under *Texas Code of Criminal Procedure* art. 26.052.

III. DISTRIBUTION OF APPOINTMENTS (THE "WHEEL")

All arrested persons shall be brought before a magistrate without unnecessary delay, but not later than 48 hours after arrest for the purpose of determining if the person is indigent for purposes of appointment of counsel. If the person is determined to be indigent, counsel will be appointed within 24 hours of the indigency determination.

A defendant desiring a court-appointed attorney shall truthfully complete an "Affidavit of Indigency" financial questionnaire, stating under oath that he is without means to retain counsel. The defendant will provide supporting documentation, if ordered to do so. The defendant may be assisted in this process by an FIO. The district judge or the judge's designee will next review the Affidavit of Indigency form and any

supporting documentation and decide if the defendant is indigent. If the defendant is found to be indigent, counsel will be appointed under the Plan to represent the defendant.

If it comes to the attention of an appointed attorney that a defendant may no longer be indigent, the attorney shall inform the district judge for further proceedings.

A. Distribution of Appointments via "The Wheel"

A qualified attorney will be appointed to each indigent defendant based on a rotating felony appointment wheel consisting of the names of qualified attorneys approved by a majority of the district judges hearing criminal cases.

An attorney may receive appointments for each level of offense for which he or she is qualified.

Each qualified attorney will be appointed to represent one indigent defendant per rotation through the felony appointment wheel as maintained by the OAA.

Attorneys approved to receive felony appointments will be added to the end of the wheel as it exists at that time on a monthly basis.

A separate list of qualified Spanish-speaking attorneys will be maintained by the OAA for

appointment to cases where the defendant's primary language is Spanish.

B. Ad Hoc Distribution of Appointments in the Trial Court

The judge of a district court hearing criminal cases or the judge's designee may deviate from the rotation system and appoint an attorney in that court who is specifically qualified under the Plan on an ad hoc basis to represent indigent defendants upon a finding of good cause to deviate from the rotation system.

The judge of a district court hearing criminal cases or the judge's designee may deviate from the rotation system and appoint an attorney in that court who is specifically qualified under the Plan on an ad hoc basis to represent indigent defendants who are charged in a motion to revoke or adjudicate community supervision in that court.

IV. QUALIFICATIONS TO RECEIVE APPOINTMENTS

A critical review of the quality of representation actually provided by attorneys applying to be on the wheel is a factor in providing high quality representation to indigent defendants. In addition to the objective criteria outlined herein, the statutes of the State of Texas provide for a subjective review of the qualifications of the attorneys applying for inclusion on the wheel. While recognizing that there is a need

for an open attorney appointment wheel, the district judges hearing criminal cases have an obligation to closely monitor those seeking approval to be on the wheel.

The establishment of this system of qualifications confers to no attorney a property interest in receiving felony court-appointments.

A. General Objective Qualifications to Receive Appointments

In order to be considered to receive appointments and, once approved, to continue to receive appointments to represent indigent felony defendants in Tarrant County, an attorney must:

1) be a member in good standing of the State Bar of Texas;

2) be familiar with the *Texas Penal Code*, the *Texas Code of Criminal Procedure*, the *Texas Rules of Evidence*, *Texas Disciplinary Rules of Professional Conduct*, Texas case law and the local rules of practice for the criminal and appellate courts of Tarrant County, Texas;

3) consistently demonstrate commitment to providing effective assistance of counsel and quality representation to criminal defendants;

4) consistently demonstrate professionalism, proficiency, and reliability in representing

criminal defendants, and in dealing with the courts and opposing counsel;

5) be of sound mind, as well as good moral and ethical character;

6) not have been sanctioned by a court for failure to appear;

7) not have been sanctioned by a court for any type of unprofessional conduct or abusive conduct;

8) maintain his or her principal office in Tarrant County (A principal office is the commercial location where the attorney conducts the majority of his or her criminal law practice, and does not include a post office address);

9) maintain a secretary, receptionist, answering service or daily monitored answering machine or voice mail system at his or her principal Tarrant County office;

10) maintain a current listing in the Fort Worth telephone book and/or in directory assistance;

11) maintain a functioning fax machine on a dedicated telephone line and an e-mail address, both available 24 hours a day and monitored on a daily basis;

12) timely and promptly respond to telephone, e-mail, regular mail or fax requests from each court and OAA;

13) maintain the capacity to access and review district attorney files on appointed cases that are available through the Tarrant County District Attorney's Office electronic case filing system;

14) file with the OAA a complete, accurate sworn "Application for Felony Court-Appointments," including all required attachments;

15) promptly notify the OAA in writing of any changes to the information contained in any filed Application for Felony Court-Appointments;

16) promptly notify the OAA in writing of any matter that may disqualify the attorney by law, regulation, rule or this Plan from receiving appointments to represent indigent defendants;

17) annually file with the OAA, by the last day of the attorney's birth month, an accurate copy of his/her State Bar of Texas Minimum Continuing Legal Education Annual Verification Report and a sworn "Annual Certification of Attorney" that he/she is in compliance with the general and specific qualifications required under this Plan;

18) timely appear and represent each appointed client at each and every court date scheduled by the court according to the Differentiated Felony Case Management system. The only exceptions for a designated substitute attorney to appear for the appointed

attorney will be for a docket appearance where previously approved by the trial court and with the approval of the defendant, and to consummate a previously negotiated case settlement with the approval of the trial court and the defendant;

19) make every reasonable effort to contact the defendant not later than the end of the first working day after the date on which the attorney is appointed and to interview the defendant as soon as practicable after the attorney is appointed;

20) submit only a properly documented and accurate "Defense Claim for Fee Payment/ Expense" form on an appointed case;

21) accept responsibility for all actions taken on each appointed case; and

22) meet any additional requirement(s) that may be later imposed by the district court judges hearing felony cases with notice to the attorneys as an addendum to this Plan.

B. Specific Objective Qualifications for Degrees of Felony Cases

In addition to the general qualifications outlined above, an attorney seeking felony court-appointments must possess the following qualifications. Current board certification in criminal law eliminates the need for the attorney to provide proof of active

participation in trials and cases at the time of application.

State Jail Felony Cases: licensed to practice in Texas for at least one year, the completion of at least 15 hours of State Bar of Texas approved Minimum Continuing Legal Education (MCLE) in the area of criminal law within the preceding 12 months and in each MCLE reporting year thereafter, and substantial and active participation within the last 10 years in five (5) criminal jury trials on the merits, and 20 pleas of guilty or five (5) contested probation revocations, all in non-class C cases.

Second and Third-Degree Felony, Motion to Revoke or Adjudicate Community Supervision, and Extradition Cases: must possess the qualifications necessary to receive state jail felony appointments and additionally be licensed to practice in Texas for at least two years, have completed at least 20 hours of approved MCLE in the area of criminal law in the preceding 12 months and in each MCLE reporting year thereafter, and substantial and active participation within the last 10 years in 10 non-class C criminal jury trials on the merits, at least two of which must have been felony cases.

First-Degree Felony and Non-Death Capital Murder Cases: must posses the qualifications necessary to receive second and third-degree felony appointments and be licensed to practice in Texas for at least three years, have

completed at least 20 hours of approved MCLE in the area of criminal law in the preceding 12 months as well as in each MCLE reporting year thereafter, and have substantial and active participation in 10 felony criminal jury trials on the merits within the last 10 years; or be board certified in criminal law by the Texas Board of Legal Specialization

Appeal and Post-Judgment Writ: licensed to practice in Texas for at least three years, completion of at least 20 hours of approved MCLE in the area of criminal law in the preceding 12 months and in each MCLE reporting year thereafter, and must have briefed and prosecuted five separate criminal appeals within the last five years; or must be board certified in criminal law or appellate law by the Texas Board of Legal Specialization.

If the defendant states on the record that he wishes for the trial attorney to prosecute the appeal and the trial attorney agrees to prosecute the appeal, the trial court may appoint the trial attorney to represent the defendant on appeal.

V. REMOVAL FROM FELONY APPOINTMENT WHEEL

The district judges hearing criminal cases in Tarrant County recognize the obligation to closely monitor those attorneys approved to be on the wheel

and to carefully consider the removal of attorneys from the wheel who provide substandard representation to their clients. A critical review of the quality of representation provided by attorneys on the wheel is an obligation of the judges under this Plan.

A. Grounds for Removal

An attorney shall be immediately removed by the CAA from the felony appointment wheel and from any case to which the attorney has been appointed for any of the following:

1) the attorney is convicted or receives deferred adjudication for any felony, including controlled substance offenses;

2) the attorney is convicted or receives deferred adjudication for any crime of moral turpitude;

3) the attorney is under indictment, information, criminal complaint or other formal charge for a felony or crime of moral turpitude;

4) the attorney intentionally misrepresents any information on an Application For Felony Court-appointments, on any Defense Claim for Fee Payment/Expenses or on any Annual Certification of Attorney;

5) the attorney fails to meet any of the general qualifications;

6) the attorney is sanctioned by the State Bar of Texas; or

7) for good cause at the discretion of a majority of the district judges trying criminal cases.

B. Reinstatement to the Felony Appointment Wheel

An attorney who was removed from the appointment wheel for the alleged commission of a felony or crime of moral turpitude may be immediately reinstated by the CAA upon providing proof that the charges were dismissed or that the attorney was acquitted so long as the attorney otherwise meets the qualifications under the Plan. In addition to dismissal of the case, the attorney shall provide written proof that all conditions antecedent to the dismissal or acquittal have been completed before reinstatement will occur.

An attorney who was removed from the appointment wheel for non-completion of MCLE may be immediately reinstated by the CAA upon providing proof that the attorney has completed the required hours so long as the attorney otherwise meets the qualifications under the Plan.

An attorney who has been removed from the appointment wheel for any other reason and who wishes to be reinstated must apply through the original application process. The attorney may reapply after the expiration of one year's removal, unless the

district judges hearing criminal cases have removed the attorney for a longer period.

In addition to the other requirements for application, the attorney shall include a written description of all measures taken by the attorney to correct the problem(s) for which the attorney was removed from the felony appointment wheel.

D. Voluntary Removal from felony Appointment Wheel

A qualified attorney may at any time request, in writing, a period of temporary voluntary removal from the felony appointment wheel. At the end of any period of less than one year, upon written request, the attorney will be returned to the felony appointment wheel if he or she otherwise remains qualified. If the period of voluntary removal exceeds one year, the attorney must reapply for felony appointments through the original application process.

VI. COMPENSATION FOR COURT-APPOINTED SERVICES

The district judges of Tarrant County hearing criminal cases have adopted a schedule of compensation for court-appointed services. In arriving at this schedule, the judges have considered the service performed, the time and labor required to perform the service, the complexity of the case involved and the experience and ability of the individuals performing the service.

All requests for compensation for all court-appointed services must either be documented on the form entitled "Defense Claim for Fee Payment/ Expenses" or submitted to the court via the IDOL program.

Court-appointed attorneys will not be compensated for the initial client notification letter and should not include this service on the "Defense Claim for Fee Payment/Expenses" form.

A. Compensation for Attorney Services

Counsel appointed to represent indigent criminal defendants shall be compensated for their services as follows:

court appearance (including uncontested disposition):	$50-300/appearance
evidentiary court appearance (including jury trial):	$500-1200/day
out-of-court time:	$50-125/hour
appellate time:	$50-125/hour

For purposes of calculating the amount to be paid for an evidentiary court appearance, a day is considered to be a calendar day even if it exceeds eight hours. Where time spent in an evidentiary court appearance is less than eight hours, the judge may authorize payment for a pro rata share of a day's compensation. Time spent out of court on the same

day as an evidentiary court appearance may be billed under the category of "out-of-court time."

B. Compensation for Expenses

Counsel appointed to represent indigent defendants shall be reimbursed for reasonable and necessary expenses, including expenses for investigation and expert witness services. Expenses incurred with or without prior court approval shall be reimbursed according to the procedures described herein. When possible, prior court approval shall be obtained before incurring expenses for investigation and expert witness services. Counsel may be reimbursed for mileage, copying expenses, and/or telephone calls in the discretion of the trial court.

1. Procedure for Prior Court Approval of Expenses

Appointed counsel shall file with the court a pretrial request for payment of investigative and/or expert witness expenses. In the discretion of the attorney, this request may be filed as an ex parte confidential request.

The request for approval of expenses must state the type of investigation to be conducted or the type of expert witness to be retained, must set out specific facts that suggest the investigation will result in admissible evidence or that the services of an expert witness are reasonably necessary to assist in the preparation of a potential defense, and shall include

an itemized list of anticipated expenses for each investigator and/or expert witness.

The judge shall grant the request for payment of expenses in whole or in part as far as the request is reasonable. If the judge denies the request in whole or in part, the judge shall state the reason for the denial in writing, attach the denial to the request, and file them in the record.

2. Procedure Without Prior Court Approval

Appointed counsel may incur investigative or expert witness expenses without prior approval of the court. On presentation of a claim for reimbursement, the judge shall order reimbursement of counsel for the expenses if the judge determines that the expenses were necessary and reasonable.

C. Compensation of Court-Appointed Investigators

Investigators appointed to assist in the defense of indigent criminal defendants shall be compensated for their services at the rate of $35 per hour. Investigators shall also be compensated for reasonable and necessary expenses, and for mileage at the mileage reimbursement rate set by the Tarrant County Commissioners Court.

VII. INDIGENCY STANDARDS

Definitions -- Terms used to determine eligibility for an indigent's defense services shall have the following meanings:

"Household income": The defendant's household income shall be defined as the defendant's income and the income of all other persons related by birth, marriage or adoption who reside with the defendant.

"Income" shall include the total cash receipts, before taxes, from all resources, including money wages and the net receipts from non-farm or farm self-employment. Further, "income" shall include regular payments from a governmental income maintenance program, alimony, child support, public or private pensions, annuities, and income from dividends, interest, rents, royalties or periodic receipts from estates or trusts, regular payments from Social Security, strike benefits from union funds, veteran's benefits, training stipends, alimony, child support and military family allotments or other regular support from an absent family member or someone not living in the household, or foster care payments, benefits from a governmental income maintenance program (AFDC, SSI, unemployment compensation or state or county general assistance or home relief), food or rent received in lieu of wages, money which is received from sale of real or personal property or received from tax refunds, gifts, one-time insurance payments or compensation for injury, non-cash benefits (food stamps, etc.).

"Liquid assets": Liquid assets shall include, but are not limited to, cash, savings and checking accounts,

stocks, bonds, certificates of deposit, and equity in real and personal property, as well as any interest in retirement accounts.

An indigent is any person with a household income at or below 125% of the latest poverty guidelines as established and revised annually by the United States Department of Health and Human Services, and whose liquid assets do not exceed $15,000.

A defendant whose household income exceeds 125% of the latest poverty guidelines may still qualify for a court-appointed attorney if the court or its designee determines special circumstances exist. In determining whether special circumstances exist, the court or its designee may consider unusual, excessive, or extraordinary medical expenses, the age or physical infirmity of household members, or other expenses. The court or its designee may also consider the complexity of the case, the estimated cost of presenting a legal defense, the fees charged by lawyers in the community for providing defense services in similar cases, whether the defendant has retained counsel in related legal matters (e.g., administrative license revocation, forfeiture, etc.), any efforts the defendant has made to retain an attorney, and any other factor impacting the ability of the defendant to retain private counsel.

The court or the court's designee may not consider whether the defendant has posted or is capable of posting bail, except to the extent that it reflects the defendant's financial circumstances as measured by the considerations herein.

A defendant may be required to reimburse Tarrant County in whole or in part the cost of legal services provided as set forth in *Texas Code of Criminal Procedure* art. 26.05. If a defendant is placed on probation or deferred adjudication, the court may impose as a condition of probation repayment of all or a portion of the county's cost for providing legal representation if it does not impose a substantial financial hardship upon the defendant or dependents. Payment are to be made through the Tarrant County Supervision and Corrections Department to the Fund for Indigent Defense of Tarrant County.

The guidelines established herein for the appointment of counsel also apply to the reimbursement of expenses incurred for the purposes of investigation or expert testimony, as approved by the court.

SIZE OF FAMILY UNIT	**125% OF POVERTY LEVEL**
1	$11,963
2	$16,038
3	$20,113
4	$24,188
5	$28,263
6	$32,338
7	$36,413
8	$40,488
For each additional person, add	$4,075

VIII. IMPLEMENTATION OF THE PLAN

This Plan will be implemented on May 1, 2006. All attorneys applying for felony court-appointments who have not been approved by that date will be required to apply under the guidelines stated in this Plan.

All attorneys currently approved under the prior plan to receive felony court-appointments will remain approved until their anniversary date. On the attorney's anniversary date, the attorney will be required to reapply under the guidelines stated in this Plan.

/s/ Sharen Wilson
Sharen Wilson, Judge Criminal District Court No. 1

/s/ Wayne Salvant
Wayne Salvant, Judge Criminal District Court No. 2

/s/ Elizabeth Berry
Elizabeth Berry, Judge Criminal District Court No. 3

/s/ Mike Thomas
Mike Thomas, Judge Criminal District Court No. 4

/s/ Bob Gill
Bob Gill, Judge 213th District Court

/s/ Everett Young
Everett Young, Judge 297th District Court

/s/ James R. Wilson
James Wilson, Judge 371st District Court

/s/ Scott Wisch
Scott Wisch, Judge 372nd District Court

/s/ George Gallagher
George Gallagher, Judge 396th District Court

Approved by: Date: April 24, 2006

/s/ Jeff Walker
Jeff Walker, Judge of the Eighth Administrative Judicial Region

May 1, 2006

Application For Felony Court Appointments
Tarrant County Criminal District Courts

Full legal name: _____

Birth month: _____

Texas Bar card #: _____

Date licensed to practice law in Texas: _____

Principle office physical address (not a post office box): _____

_____

Principle office mailing address: _____

_____

Principle office telephone number(s): _____

Principle office fax number(s): _____

Pager number(s): _____

Mobile telephone number(s): _____

Regularly monitored e-mail address(es): _____

Request for Appointments

I am applying to be considered for the following appointments:

____ 1. State jail felony and extradition.

____ 2. Second and third degree felony, and petition to revoke or adjudicate community supervision.

____ 3. First degree felony and non-death capital murder.

____ 4. Appeal and post judgment writ.

Please Circle: Yes or No

Yes No 1. Are you currently a member in good standing with the State Bar of Texas?

Yes No 2. Are you certified in criminal law by the Texas Board of Legal Specialization?

Yes No 3. Have you ever been sanctioned by the State Bar of Texas Grievance Committee or the Texas Commission on Lawyer Discipline?

Yes No 4. Do you have an appeal pending of any State Bar of Texas sanction?

Yes No 5. Have you ever been sanctioned for failure to timely appear before a court?

Yes No 6. Has a court ever found that you have provided ineffective assistance of counsel?

Yes No 7. Have you ever been sanctioned by a court for any misconduct committed while representing a client?

Yes No 8. Are you currently under indictment or charged for a criminal offense other than class C traffic offenses?

Yes No 9. Have you ever been convicted or placed on deferred adjudication for

any offense other than a class C traffic offense?

Yes No 10. Do you have unique training or skill in mental health cases?

Yes No 11. Do you have training or skill as a deaf interpreter?

Yes No 12. Is your principle office located in Tarrant County, Texas?

Yes No 13. Do you maintain a secretary, receptionist, answering service, or regularly monitored answering machine or voice mail system at your principle office in Tarrant County, Texas?

Yes No 14. Are you fluent in any other language other than English? If so, please list. _____

Yes No 15. Do you represent any governmental entity as a judge or attorney? If so, please list. _____

Yes No 16. Do you have any legal conflicts that would prohibit you from taking appointments? If so, please state. ___
_____

Yes No 17. Is there any matter that would disqualify you by law, regulation, rule or this Plan from receiving appointments to represent indigent defendants? If so, please state. _____
_____

Required Attachments

1. Applicant's most recent reporting year CLE report from the State Bar of Texas.

2. If Applicant has been sanctioned by the State Bar of Texas Grievance Committee or the Texas Commission on Lawyer Discipline in the last 10 years, attach the decision(s). If desired, attach a written explanation.

3. If Applicant has been sanctioned for failure to appear before a court or for misconduct committed while representing a client in the last 10 years, attach any applicable documents. If desired, attach a written explanation.

4. If a court has found that Applicant has provided ineffective assistance of counsel in the last 10 years, attach any applicable documents. If desired, attach a written explanation.

5. If Applicant has ever been convicted of or placed on deferred adjudication for an offense other than a class C traffic offense, attach copies of all final orders (or those deferring adjudication) and judgments. If desired, attach a written explanation.

6. If applying for appellate appointments, list the style and case number of each case relied on to qualify.

7. If applying for trial appointments, submit a copy of the judgment for each trial on the merits, each guilty plea and each contested probation revocation relied on to qualify for the degree of appointment sought.

8. If the judgment of any case relied on for qualification does not list the Applicant as attorney, Applicant must submit an affidavit from the trial judge verifying the attorney's substantial and active participation in the trial or appeal.

Oath of Applicant

I, _____, the undersigned attorney, hereby state under oath that all of the above information is complete, true and correct; that I have read and understand the qualifications set out in the Tarrant County District Courts Felony Court Appointment Plan and that I meet all the qualifications for the degree of appointment sought. I understand that I have no property interest in receiving appointments; and that in addition to meeting the qualifications under the Plan, that I will not receive felony court appointments unless I am approved to do so by a majority of the district judges hearing criminal cases. I understand that I have a duty to promptly notify the Coordinator of Attorney Appointments (CAA) of any matter that may make me ineligible to receive appointments under the Tarrant County District Courts Felony Court Appointment Plan; and to notify the CAA, in writing, of any changes to the information contained in this Application. I understand that I may be removed from the appointment wheel for failure to meet any qualification stated in the Tarrant County District Courts Felony Court Appointment Plan and for

failure to promptly notify the CAA in writing of any change to my status.

_____
Attorney

SUBSCRIBED AND SWORN BEFORE ME on this the _____ day of 200___.

_____
Person administering oath

Office of person administering oath: _____

_____

For CAA use only:

On the _____ day of _____, 200___, the district judges hearing criminal cases of Tarrant County, Texas considered the foregoing application and it is hereby:

Approved: _____

Denied: _____

Comments: _____

_____ Presiding Judge

Sharen Wilson _____
Sharen Wilson, Judge Criminal District Court No. 1

Wayne Salvant _____
Wayne Salvant, Judge Criminal District Court No. 2

Elizabeth Berry _____
Elizabeth Berry, Judge Criminal District Court No. 3

Mike Thomas

Mike Thomas, Judge Criminal District Court No. 4

Bob Gill

Bob Gill, Judge 213th District Court

Everett Young

Everett Young, Judge 297th District Court

James Wilson

James Wilson, Judge 371st District Court

Scott Wisch

Scott Wisch, Judge 372nd District Court

George Gallagher

George Gallagher, Judge 396th District Court

Effective Date: May 1, 2006

Amended 10-7-04

FELONY PUBLIC APPOINTMENT GUIDELINES
Tarrant County Criminal District Courts

A. General Qualifications – mandatory

1. An attorney must be a member in good standing of the State Bar of Texas.

2. An attorney must maintain his or her principal office in Tarrant County. A post office address will not satisfy this requirement.

3. An attorney must have a secretary, receptionist, answering service, or a regularly monitored answering machine.

4. An attorney must have a functioning fax machine and an e-mail address, both available 24 hours a day.

5. An attorney shall have on file with the Coordinator of Attorney Appointments (CAA) a completed, sworn application approved by the Judges of District Courts trying felony cases.

6. An attorney shall promptly notify, in writing, the CAA of any changes to the information contained in the application for felony appointments.

7. An attorney shall promptly notify, in writing, the CAA of any matter that would disqualify the attorney by law, regulation, or rule under these guidelines from receiving appointments to represent indigent defendants.

8. An attorney shall annually file with the CAA each year a copy of his/her State Bar of Texas

Continuing Legal Education annual reporting form and a certification that he/she is in compliance with these general and specific qualifications.

9. An attorney shall meet any additional requirements that may be later imposed by the Judges of the District Courts trying felony cases.

10. An attorney seeking to meet the specific qualifications for any category must:

a) provide the CAA with a copy of the judgment or other official document listing the applicant as attorney of record on any case outside of Tarrant County listed on the sworn application, and

b) provide an affidavit signed by the trial judge verifying his substantial and active participation in any trial where the court records do not reflect the attorney's participation.

11. Jury Trial means a trial on the merits where the jury is selected and at least one witness testifies. Jury Trial does not include a competency hearing, whether contested or unconstested.

12. Except for good cause, the appointed attorney must appear and represent the indigent defendant. The only exception for an associate or partner to appear will be for a courtesy docket appearance or the acceptance of a plea agreement that was previously arranged by the appointed attorney. The appointed attorney is ultimately the one

responsible for all actions. The appointed attorney will be the only attorney paid by the court.

13. Applicant will be rejected if application is incomplete or inaccurate.

B. Specific Qualifications – minimums for each category

1. State Jail Felony

a. an attorney must have substantial and active participation in five (5) criminal (non-class C) jury trials, and 20 pleas of guilty or five (5) contested revocations within the last 10 years,

b. an attorney must have been licensed to practice for 1 year, and

c. an attorney must have completed 15 hours of criminal law CLE in the preceding reporting year and in each CLE reporting year, thereafter.

2. Second and Third Degree Felony and Motion to Revoke or Adjudicate Community Supervision

a. an attorney must have substantial and active participation in 10 criminal (non-class C) jury trials within the last 10 years,

b. an attorney must have been licensed to practice for two (2) years, and

c. an attorney must have completed 20 hours of criminal law CLE in the preceding reporting year and in each CLE reporting year, thereafter.

3. First Degree Felony, non-death Capital Murder and Extradition

a. an attorney must be board certified in criminal law by the Texas Board of Legal Specialization or must have substantial and active participation in 10 felony criminal jury trials within at least the last 10 years, and

b. an attorney must have been licensed to practice for three (3) years, and

c. an attorney must have completed 20 hours of criminal law CLE in the preceding reporting year and in each CLE reporting year, thereafter.

4. Appeal and Post-Judgment Writ

a. an attorney qualified for trial appointment for any level can receive appellate appointments at that same level, or

b. an attorney must have completed five (5) criminal appeals, and

c. an attorney must have been licensed to practice for two (2) years, and

d. an attorney must have completed either 10 hours of appellate CLE or 15 hours of criminal law CLE in the preceding

reporting year and in each CLE reporting year, thereafter.

5. Alternative Program

As an alternative program to the wheel system for appointing counsel for indigent defendants, the Judge of a Criminal District Court or a District Court giving preference to criminal cases may appoint a specifically named attorney from the approved list of attorneys to those indigent defendants who are charged in a Motion to Revoke or Adjudicate Community Supervision in that court.

6. Capital Murder – Death Penalty Sought

To be qualified for appointment as trial counsel, as appellate counsel, or to apply for writ of certiorari in the United States Supreme Court in death penalty cases, an attorney must possess the following qualifications:

a. Counsel must be familiar with the Texas Penal Code, the Texas Code of Criminal Procedure, and the local rules of practice for criminal courts in Tarrant County, Texas.

b. For appointment as trial counsel in a death penalty case, counsel must have a minimum of five (5) years experience in the litigation of criminal cases. Counsel shall have tried to a verdict as lead defense counsel a significant number of felony cases, including homicide trials and other trials for offenses punishable

as second or first degree felonies or capital felonies. Counsel must have trial experience in the use of and challenges to mental health or forensic expert witnesses; and investigating and presenting mitigating evidence at the penalty phase of a death penalty trial. Counsel must exhibit proficiency and commitment to providing quality representation to defendants in death penalty cases.

c. For appointment as lead trial counsel, counsel must have previously served as trial counsel in or have presided over, at least one (1) death penalty case that was tried to a verdict.

d. For appointment as appellate counsel, counsel must have substantial experience in the trial and/or the direct appeal of criminal cases of a serious and complex nature (including murder cases). For appointment as appellate counsel, prior death penalty experience is not required, but it is recommended.

e. Counsel must have significant and continuous training in the field of criminal law *and* in the specific area of death penalty litigation. Counsel shall have participated in continuing legal education courses or other training related to criminal defense in death penalty cases. Not later than the second anniversary of the date an attorney is placed on the qualified list for death

penalty cases and each year following the second anniversary, the attorney must present proof to the local selection committee that the attorney has successfully completed the minimum continuing legal education requirements of the State Bar of Texas, including a course or other form of training relating to the defense of death penalty cases. Failure to comply with this requirement will result in the attorney losing certification for appointment in death penalty cases.

f. Any attorney who has served as trial counsel in a death penalty case may not be appointed as appellate counsel in that case, unless both the defendant and attorney request the appointment on the record, and the Court finds that good cause exists to make the appointment.

C. Distribution of Cases

1. An attorney will receive one defendant per rotation on the felony public appointment list.

2. An attorney may receive an appointment for the highest level of offense he/she has chosen and for which he/she is qualified and for any lower level of offense in which he/she has elected to participate.

3. Appointments will be made from a rotating list of the names of eligible attorneys, arranged according to the chronological date of receipt of the approved application.

4. New attorneys will be added on a quarterly basis to the end of the chronological list as it exists at the time the names are added.

D. Grounds for Removal from Felony Public Appointment List

1. An attorney shall be removed from the felony public appointment list and from any case to which the attorney has been appointed for the following:

a. conviction or deferred adjudication for any felony, including controlled substances offenses,

b. conviction or deferred adjudication for any crime of moral turpitude,

c. being under indictment or formally charged with a felony or crime of moral turpitude,

d. intentional misrepresentation on the application for felony public appointment or request for compensation or recertification application, or

e. failure to meet the general qualifications.

2. An attorney may be removed from the felony public appointment list and from any case to which the attorney has been appointed for the following:

a. failing to perform the attorney's duty owed to the defendant,

b. failing to maintain compliance with each of these felony public appointment guidelines,

c. finding by a court that he/she provided ineffective assistance of counsel, or

d. for good cause at the discretion of the Judges of the District Courts trying criminal cases.

E. Reinstatement

An attorney who was removed from the public appointment list for the reasons stated in E.1.a,b, or c above, may be immediately reinstated upon providing proof that the charges were dismissed or that the attorney was acquitted, so long as the attorney meets the qualifications.

F. Removal for Special Circumstances/Extension

Because of special circumstances (ex. a lengthy trial, extended illness, high number of trials scheduled, a death in family, etc.) the attorney can request in writing that his/her name be temporarily removed from the public appointment list for any period. At the end of the period, the attorney will be returned to the public appointment list if he/she is in compliance with the qualification requirements.

G. Attorneys who accept appointments in the criminal district courts of Tarrant County under these guidelines will also adhere to the following conditions:

a. Follow the Differentiated Felony Case Management plan.

b. On all cases in which an attorney is appointed, whether the defendant is in custody or on bond, the attorney will agree to appear at all scheduled settings, including pre-indictment settings, to ensure the defendant's compliance with these guidelines and any bond conditions.

c. If it comes to the attention of an appointed attorney that the defendant many no longer be indigent, the attorney shall inform the judge of the court in which the case is pending for further proceedings.

TEXAS FAIR DEFENSE ACT
APPLICATION FOR COURT APPOINTMENTS
IN DALLAS COUNTY DISTRICT COURTS
DO NOT USE THE BACK OF PAGES
17 COPIES WITH ORIGINAL

LAST NAME: _____ FIRST: _____

BAR CARD: _____

PHYSICAL ADDRESS: _____

MAILING ADDRESS: _____

TELEPHONE: _____ FAX: _____

PAGER: _____ CELL: _____

E-MAIL ADDRESS: _____

LEGAL EDUCATION/YEAR OF GRADUATION: ____

YEAR ADMITTED TO STATE BAR: _____

LICENSED IN ANY OTHER STATE? _____

WORK HISTORY SINCE LAW SCHOOL: _____

_____

_____

YEARS OF CRIMINAL PRACTICE: _____

PRACTICE THAT IS CRIMINAL _____%

I PRACTICE IN OTHER COUNTIES _____%

OF THE TIME. WHICH ONES? _____

FLUENCY IN ANOTHER LANGUAGE?
YES ☐ NO ☐ EXPLAIN: _____

LIST EXPERIENCE WITHIN THE LAST TEN YEARS, APPROXIMATE NUMBER FELONY JURY TRIALS, FIRST CHAIR _____. LIST UP TO 12. ADD SHEET IF NECESSARY. Note: multiple cause numbers/defendants tried in the same proceeding count as only ONE trial.

STYLE	**CAUSE #**	**CHARGE**

APPROXIMATE NUMBER OF FELONY JURY TRIALS, SECOND CHAIR _____ LIST UP TO 12. ADD SHEET IF NECESSARY.

STYLE	**CAUSE #**	**CHARGE**

NUMBER OF MISDEMEANOR JURY TRIALS _____.
Updated May 17, 2006

Calculation Sheet

NAME: _____ DATE: _____

POINT SYSTEM FOR QUALIFICATION:* Please indicate your experience and total points in each category below.

Experience must come within the preceding ten [10] years. You must have points in three of the five categories in order to be qualified, unless you have sufficient points in categories 1 and 4. Each qualified attorney must attend either the State Bar Advanced Criminal Law Seminar once every three [3] years or the TCDLA Advanced Law Short Course every two [2] years to retain qualification.

**Unusual or exceptional experience demonstrating substantial involvement in criminal law may be

Experience	Points
1 Number of felony trials as lead counsel**: X2=	
2 Number of felony jury trials as verified second chair:	+
3 Number of felony appeals:	+
4 Fifteen [15] hours of Continuing Legal Education in criminal law within the preceding two [2] years, add two [2] points. ATTACH DOCUMENTATION	+
5 Board Certified in Criminal Law by the Texas Board of Legal Specialization, add five [5] points	+
Any appellate court finding of ineffective assistance of counsel within the last five [5] years, minus 5 points	-
Any sustained grievance by the State Bar of Texas within last five [5] years, subtract five [5] points	-
TOTAL POINTS	=

substituted for trial experience. If claiming this exception, please provide a detailed explanation of your experience as an attachment to this application.

Your total points, along with your years of licensure, will determine what level of appointment you may

receive. The following standards have been established:

Felony Level	Requirements
State Jail	Licensed for two [2] years AND six [6] points
Third Degree	Licensed for three [3] years AND twelve [12] points
Second Degree	Licensed for four [4] years and eighteen [18] points
First Degree	Licensed for five [5] years AND twenty-five [25] points

Signature: _____ Date: _____

SWORN TO and SUBSCRIBED
before me on _____

Notary Public in and for
Dallas County, The State of Texas

LIST 5 JUDGES WITH KNOWLEDGE OF YOUR ABILITY _____

_____

ARE YOU BOARD CERTIFIED IN CRIMINAL LAW?
YES ☐ NO ☐

MOST RECENT YEAR ATTENDED STATE BAR OR TDCLA ADVANCED CRIMINAL LAW COURSE_____

HAVE YOU BEEN HELD INEFFECTIVE BY AN APPELLATE COURT IN THE LAST 5 YEARS?
YES ☐ NO ☐

EXPLAIN: STYLE OF CASE APPELLATE COURT YEAR

ARE YOU CURRENTLY IN GOOD STANDING WITH THE STATE BAR? YES ☐ NO ☐

HAVE YOU HAD A GRIEVANCE SUSTAINED IN THE LAST 5 YEARS? YES ☐ NO ☐

EXPLAIN:

_____

_____

HAVE YOU EVER BEEN CONVICTED OF OR SERVED PROBATION FOR ANY FELONY OR MISDEMEANOR OF MORAL TURPITUDE? IF SO, EXPLAIN _____

DO YOU CURRENTLY HAVE ANY CRIMINAL CASES ABOVE THE LEVEL OF A TRAFFIC TICKET PENDING AGAINST YOU? YES ☐ NO ☐

I AM APPLYING TO BE CONSIDERED FOR APPOINTMENT TO THE FOLLOWING:

- ☐ 1ST DEGREE FELONIES
- ☐ 2ND DEGREE FELONIES
- ☐ 3RD DEGREE FELONIES
- ☐ STATE JAIL FELONIES

COURTS FROM WHICH YOU DO NOT WANT TO RECEIVE APPOINTMENTS _____

I understand that the law requires that I make every reasonable effort to contact the defendant not later

than the end of the first working day after the date on which I am appointed and interview the defendant as soon as practicable after I am appointed. I will represent the defendant until charges are dismissed, the defendant is acquitted, appeals exhausted, or until I am relieved of my duties by the Court or replaced by other counsel.

I also understand that as an officer of the Court I will be held responsible by the Criminal District Courts for the truthfulness of the information provided in this form.

_____

Signature of Applicant

143

(3)

No. 09-108

Supreme Court, U.S.
FILED
OCT 15 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

LAWRENCE PATRICK DAVIS,

Petitioner,

vs.

TARRANT COUNTY, TEXAS, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION OF RESPONDENT TARRANT COUNTY

CHRISTOPHER W. PONDER
Assistant District Attorney
Counsel of Record
TARRANT COUNTY DISTRICT ATTORNEY'S OFFICE
CIVIL DIVISION
401 West Belknap Street, 9th Floor
Fort Worth, Texas 76196-0401
Tel: (817) 884-1233
Fax: (817) 884-1675
Counsel for Respondent Tarrant County, Texas

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the Fifth Circuit's decision relative to standing is in conflict with any Supreme Court or other circuit's opinion.

2. Whether denial by state district judges of the application of an attorney to be included on the list of those receiving court appointments in criminal cases is a "judicial act" for which the district judges are entitled to absolute immunity.

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OTHER AUTHORITIES:

R. Stern, E. Gressman, S. Shapiro, K. Geller, Supreme Court Practice 226 (8th ed. 2002) 8

STATEMENT OF THE CASE

Petitioner alleges that the denial of his application for admission to the list of attorneys receiving felony court appointments was in violation of his procedural and substantive due process rights as well as a violation of the Constitution's equal protection clause. U.S. CONST. amend. XIV, § 1. He brought suit against the state district judges[1] who denied his application; additionally, Petitioner brought suit against Tarrant County, Texas, alleging that the district judges were county policymakers. The Fifth Circuit Court of Appeals held that the district judges' acts in formulating and implementing the court appointment plan were judicial acts entitled to absolute judicial immunity and that they acted, not on behalf of Tarrant County, but rather for the State of Texas.

1. Petitioner, a lawyer licensed by the State of Texas, applied for admission to the list of attorneys who receive court appointments to represent indigent defendants charged with a felony in Tarrant County. Petitioner's application was denied by the district judges. Petitioner filed suit against the district judges and Tarrant County for this denial, alleging that the actions of the district judges constituted policies of Tarrant County because the relevant statute provides for the adoption of procedures "countywide." *See* TEX.

---

[1] The state district judges who are respondents in this matter will hereafter be referred to as "the district judges."

CRIM. PROC. CODE ANN. § 26.04 (a) (Vernon 2009). Petitioner claimed that despite having satisfied all objective qualifications adopted by the district judges, he had nevertheless been denied court appointments. He attributed this denial to an allegedly improper subjective component in the application process. According to Petitioner's legal theory, such a subjective component is statutorily prohibited; under his view of the law, if a lawyer has satisfied the objective credentials, his admission to the appointment list should be a mere ministerial act of the district judges.

The relevant statutory authority is centered upon the Texas Fair Defense Act, which the Texas Legislature passed in 2001. *See* 77th Leg., R.S., Ch. 906, 2001 TEX. GEN. LAWS 906. That Act formalized the procedures for appointment of counsel to indigent defendants. It provides guidance for judges to effectuate the appointment of counsel, both for the benefit of indigent defendants and for those attorneys receiving appointments.

2. The application process in Tarrant County is conducted annually. Petitioner's application in 2005 was denied. In 2006, Petitioner refused to apply, alleging that a component of the application required a waiver of his substantive due process rights. This refusal prevented Petitioner from acquiring the necessary standing to make any claim relevant to a denial of his application in 2006. The Fifth Circuit agreed and rejected Petitioner's implied argument of futility, because it was based upon no more than mere speculation or surmise. (Pet. App. 1-30)

Additionally, the district judges and Tarrant County defended against Petitioner's claims at the United States District Court and Fifth Circuit Court of Appeals on the basis that the decisions of the district judges were judicial in nature and, consequently, the district judges were entitled to absolute immunity. Also, these judicial acts were performed by the district judges on behalf of the State of Texas and not the county in which their courts were geographically located. A municipality is liable only for the acts of its own policymakers.

3. The U.S. District Court granted the district judges' and Tarrant County's motions to dismiss pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure. (Pet. App. 31-44) The U.S. District Court recognized that the district judges were acting within their judicial capacity at all times relevant to Petitioner's claims. (Pet. App. 38-41) The U.S. District Court further found that the policies and procedures adopted by the district judges represented those of the State of Texas and not of Tarrant County (Pet. App. 42-43), citing prior Fifth Circuit precedent in *Hamill v. Wright*, 870 F.2d 1032 (5th Cir. 1989), which stated that "Texas district judges act for the state in appointing counsel for indigent criminal defendants, and the county is not responsible under § 1983 for their actions in this regard." *Id.* at 1037.

The Fifth Circuit affirmed the dismissal, agreeing with the U.S. District Court, by holding that "the act of selecting applicants for inclusion on a rotating list of attorneys eligible for court

appointments" was "clearly a judicial act." *Davis v. Tarrant County*, 565 F.3d 214, 226 (5th Cir. 2009). (Pet. App. 24) Because compiling the list "is inextricably linked to and cannot be separated from the act of appointing counsel in a particular case," the court held that the district judges were protected by absolute immunity. *Id.* Moreover, the Fifth Circuit found that Petitioner lacked standing for any claims connected to a denial of court appointments in 2006 because he failed to submit an application. (Pet. App. 12)

REASONS FOR DENYING THE WRIT

Petitioner has made no competent argument to support the jurisdiction of this Court.

- First, relative to the issue of standing, Petitioner alleges a conflict between decisions of the Supreme Court and the Fifth Circuit, based upon a misunderstanding of the cases.

- Second, the Fifth Circuit's holding that the acts of the district judges were judicial in nature and were protected by judicial immunity is consistent with this Court's decision in *Forrester v. White*, 484 U.S. 219, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988), and similar decisions by

other courts of appeal.[2] Any conflict is found merely within the facts of each case, not in any jurisprudential disagreement.

I. Whether the Fifth Circuit's decision relative to standing is in conflict with any Supreme Court or other circuit's opinion.

The appellate court's observation that Petitioner "[did] not clearly articulate his response to the . . . standing argument," could be applied equally to Petitioner's initial argument in his Petition for Writ of Certiorari. (Pet. App. 11) Whether the cause of action is one for damages or declaratory relief, the requirements of Article III standing are axiomatic. To present a justiciable claim there must be a firm "case or controversy;" this is established through the satisfaction of three criteria: an injury in fact, causation, and redressability.

These elements are the "irreducible constitutional minimum" and apply equally to suits brought pursuant to the Declaratory Judgment Act and those brought for monetary damages. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Petitioner's own authority, *Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001), states that the

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[2] *Sparks v. Character & Fitness Comm.*, 859 F.2d 428 (6th Cir. 1988); *Roth v. King*, 449 F.3d 1272 (D.C. Cir. 2006); *Smith v. City of Hammond, Indiana*, 388 F.3d 304 (7th Cir. 2004).

Declaratory Judgment Act "does not jettison traditional standing requirements."

Neither the decision below nor the record raises the question that Petitioner proposes in his Petition for Writ of Certiorari. The Fifth Circuit's decision in the present case makes clear that Petitioner's failure to submit a 2006 application precludes standing. To possess the requisite standing "a plaintiff generally must submit to the challenged policy before pursuing an action to dispute it." *Davis*, 565 F.3d at 220. The appellate court inferred, *sua sponte*, a futility argument on Petitioner's behalf. (Pet. App. 11-12) Rejecting the futility defense, the appellate court noted the string of decisions across multiple circuits that address the futility exception for general standing requirements. Petitioner makes no contention in his Petition for Writ of Certiorari that he is excepted from the mandatory standing requirement due to futility.

Petitioner argues instead that the Fifth Circuit's decision conflicts with its own decision in *Okpalobi v. Foster*, and this Court's decision in *Lujan*. Any attempt to contrast the Fifth Circuit's decision in the present case with these two cases is inapposite; they are only related on basic elements of standing. Neither *Okpalobi* nor *Lujan* addressed the futility exception to Article III standing requirements upon which the Fifth Circuit based its decision.

Petitioner also cites this Court's decision in *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 57 S.Ct. 461,

81 L.Ed. 617 (1937), but provides no real context for its invocation. Tarrant County assumes that Petitioner is suggesting that the Fifth Circuit erred in not considering his claim with a more relaxed standing requirement for "controversies" seeking declaratory relief. Chief Justice Hughes, writing for the unanimous Court in *Aetna Life*, maintained, however, that jurisdiction is only found in cases that have "a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Aetna Life*, 300 U.S. at 241, 57 S.Ct. at 464. Utilizing this opinion as support for Petitioner's justification of certiorari is misplaced. The standing principles stated by this Court in *Aetna Life* are not inconsistent with the Fifth Circuit's decision in the present case. Petitioner's failure to apply for appointments in 2006 reduces his claim to one of mere speculation and surmise and requires the analysis of the "hypothetical state of facts" lamented by this Court.

There is no conflict between the Fifth Circuit and this Court on the point of standing. Petitioner merely disagrees with the Fifth Circuit's decision. And this Court does not sit to merely correct such errors by an appellate court.

II. Whether the denial by state district judges of the application of an attorney to be included on the list of those receiving court appointments in criminal cases is a "judicial act" for which the district judges are entitled to absolute immunity.

1. Despite the appellate court's statement that they "disagree with the [Second Circuit] *Mitchell* court," this does not reflect the type of "square and irreconcilable conflict" that is appropriate for justifying this Court's jurisdiction. R. Stern, E. Gressman, S. Shapiro, K. Geller, Supreme Court Practice 226 (8th ed. 2002). The disagreement reflects the distinguishing factual nature of the case and not a fundamental and irreconcilable disagreement of the law.

In *Mitchell v. Fishbein*, 377 F.3d 157 (2d Cir. 2004), the Second Circuit analyzed the system of appointing counsel to indigent defendants established by the Legislature of the State of New York.[3] The system delegated the rulemaking authority for the administration of the plan to the local Appellate Division of the judiciary. Pursuant to that authority,

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[3] The New York State law required "the governing body of each county and the governing body of the city . . . [to] place in operation throughout the county a plan for providing counsel to persons charged with a crime . . . who are [indigent]." *Mitchell*, 377 F.3d at 160. The plan at issue in *Mitchell* required the Bar Associations to prepare and certify a list of attorneys and authorized the Appellate Division of the New York Supreme Court to promulgate the necessary rules for the administration of the plan. *Id.* at 161.

the Appellate Division established a Central Screening Committee to compile a list of attorneys who were willing and qualified to receive court appointments.[4]

The plaintiff, an attorney licensed by the State of New York, was denied recertification for the list, effectively depriving him of the receipt of court appointments, and he consequently filed suit against the members of the Central Screening Committee. The plaintiff was not, however, removed from any matter under which representation had already begun. The committee's decisions had no impact on any particular case.

The Second Circuit held that because the committee's acts were not precisely analogous to those of a judge, nor were the committee's acts integrally related to a particular "case or controversy," the committee was not entitled to the absolute immunity that may shield quasi-judicial actors. Noting the legislative prerogative present, the Second Circuit held: "The mere presence of the Appellate Division in this chain does not transmute the obligation imposed by the Legislature on the City into an inherent power of the judiciary." *Id.* at 169. According to the Second Circuit, the actions of the committee were more a function of organizing the method of payment for court appointments, not the appointment power that

[4] The members of this Central Screening Committee are the relevant defendants at issue in the *Mitchell* decision.

is inherent to the judiciary. *Id.* "For an attorney appointed to represent an indigent defendant, the difference between being on [the list of appointees] and not being on such a [list] is simply the difference between being entitled to publicly funded compensation and not being entitled to such compensation." *Id.* This contrasts sharply with the broad authority afforded to the judiciary at issue in the present case.

The distinguishable factual basis for the Second Circuit's decision in *Mitchell v. Fishbein* defeats Petitioner's claim of a circuit conflict. In the present case, the legislative authority that grants the district judges the authority to create and implement a system for court appointments bears no similarity to the New York Legislature's provisions in *Mitchell*.

The Texas Legislature passed the Texas Fair Defense Act in 2001. That Act formalized the procedures for appointment of counsel to indigent defendants. It provided guidance for judges to effectuate the appointment of counsel, both for the benefit of indigent defendants and for those attorneys receiving appointments. Specifically, the Fair Defense Act provides:

> The judges of the . . . district courts trying cases in each county, by local rule, shall adopt and publish written countywide procedures for timely and fairly appointing counsel for an indigent defendant. . . . A court shall appoint an attorney from a public appointment list using a system of rotation. . . . The court shall appoint attorneys

> from among the next five names on the appointment list in the order in which the attorneys' names appear on the list . . .

TEX. CRIM. PROC. CODE ANN. § 26.04(a) (Vernon 2009).

Unlike the New York legislation in *Mitchell*, the provisions of the Fair Defense Act did not impose any obligations – other than funding – on any entity other than the judiciary.

The acts by the Central Screening Committee in *Mitchell* and the acts by the state district judges in the present case illustrate the dichotomy present in the functional approach articulated by this Court in *Forrester v. White*, 484 U.S. 219, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988). As the Fifth Circuit stated:

> that the act of selecting applicants for inclusion on a rotating list of attorneys eligible for court appointments is inextricably linked to and cannot be separated from the act of appointing counsel in a particular case, which is clearly a judicial act, and therefore that the judges' acts at issue in this suit must be considered to be protected by judicial immunity.

Davis, 565 F.3d at 226.

2. The factual distinctions, however, need not come only from a comparison of Second Circuit and Fifth Circuit decisions; the Second Circuit has produced similarly distinctive opinions of its own on this issue. On August 28, 2009, the Second Circuit issued its decision in *Bliven v. Hunt*, 579 F.3d 204 (2d Cir.

2009). In *Bliven*, the Second Circuit rejected the plaintiff's attempt to employ the decision in *Mitchell* to breach the defendant judges' absolute immunity. The plaintiff – a city public defender – sued a trio of judges alleging an improper reduction of fees submitted for compensation.

In distinguishing the facts, the Second Circuit elucidated the basis for its decision in *Mitchell*, stating that the committee's functions were not integrally related to any specific judicial proceeding. Unlike the committee in *Mitchell*, whose acts were not integral to any specific case, the trio of judges in *Bliven* made decisions regarding the appropriateness of compensation vouchers for specific cases; a similar factual distinction that is present when *Mitchell* is contrasted with the case at bar. The present case is no more in conflict with *Mitchell* than *Mitchell* is with its fellow Second Circuit decision in *Bliven*.

3. Both the Second Circuit's decision in *Mitchell v. Fishbein* and the Fifth Circuit's decision in the present case are derivatives of this Court's decision in *Forrester v. White*, 484 U.S. 219, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988). In *Forrester*, Justice O'Connor, writing for the Court, noted the difficulties that "have arisen primarily in attempting to draw the line between truly judicial acts, for which immunity is appropriate, and acts that simply happen to have been done by judges." *Forrester*, 484 U.S. at 227, 108 S.Ct. at 544. Both the Second and Fifth Circuits employ the same functional approach described by Justice O'Connor; an approach necessary because

there is no "precise and general definition of the class of acts entitled to immunity." The circuits have successfully drawn distinctions between judicial acts and acts that are undertaken by a judge in another capacity. They have done so based upon the specific facts presented to them. And they have done so in a way that is not legally contradictory but distinct, based upon the facts.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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In The
Supreme Court of the United States

LAWRENCE PATRICK DAVIS,

Petitioner,

v.

TARRANT COUNTY, TEXAS, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR THE RESPONDENT JUDGES IN OPPOSITION

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PARTIES TO THE PROCEEDING

Petitioner is Lawrence Patrick Davis.

Respondents are Tarrant County, Texas and the following judges in both their individual and official capacities: Sharen Wilson, Wayne Salvant, Elizabeth Berry, Mike Thomas, Mollee Westfall, Everett Young, Scott Wisch, George Gallagher, Robert K. Gill, James Wilson, and Jeff Walker.

This brief is filed on behalf of all respondents except Tarrant County.

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BRIEF FOR THE RESPONDENT JUDGES IN OPPOSITION

Unable to identify any conflict among the circuits on a question of federal law, petitioner seeks to embroil the Court in his local dispute with the respondent judges of Tarrant County, Texas—whose challenged actions have purportedly "circumvented the purpose and spirit" of a state statute governing the procedure by which attorneys are appointed to represent indigent criminal defendants in Texas. Pet. 10. Neither of the two questions presented warrants the Court's involvement. Based on the absence of circuit conflict, the fact-bound nature of petitioner's arguments, and the correctness of the court of appeals' judgment, the petition for a writ of certiorari should be denied.

STATEMENT

The respondent judges incorporate by reference the statement of facts contained in the court of appeals' opinion, Pet. App. 2-10, but wish to highlight several significant points.

1. As his complaint reflects, petitioner's application for inclusion on the list of attorneys who receive appointments to represent indigent criminal defendants in Tarrant County courts was made in 2005 under a now-superseded set of guidelines. R.14 (Complaint 6); Pet. App. 7-8, 10, 47-52.[1] Petitioner did not reapply after a new appointment plan was

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1. "R." refers to the record as paginated by the court of appeals. Petitioner's complaint (along with all other district court filings) may be viewed on the Northern District of Texas's "CM/ECF Docket Sheets" website (No. 4:07-cv-00444). Circuit-court filings may be viewed on the Fifth Circuit's "PACER" website (No. 07-11223).

implemented in 2006 (Pet. App. 61-81), nor did he allege that he would have applied under the 2006 plan but for its new provisions. Instead, he successfully applied to receive appointments in neighboring Dallas County. R.18-19 (Complaint 10-11). He alleged only that, after implementation of the 2006 plan in Tarrant County courts, eligible attorneys who—unlike himself—actually applied under that plan would have grounds to complain. R.18-19, 24 (Complaint 10-11, 16).

2. Although petitioner quotes a provision of the Texas Code of Criminal Procedure referring to the "objective qualifications necessary for an attorney to be included" on a list of counsel who will receive criminal appointments, TEX. CODE CRIM. PROC. art. 26.04(e)(1)(A)(ii) (quoted at Pet. 7-8), he fails to acknowledge that the same statute also calls for a subjective determination by the judges of the courts in which appointed counsel will appear. Specifically, the statute provides that, in addition to "meet[ing] the objective qualifications specified by the judges," each attorney whose name appears on the criminal-appointment list must be "approved by a majority of the judges who established the appointment list." *Id.* art. 26.04(d)(2), (4). Accordingly, petitioner's assertion that the 2006 appointment plan "was contrary to the specific language" of article 26.04, Pet. 7, is erroneous.

The respondent judges also contest petitioner's characterization of either the superseded appointment guidelines or the 2006 appointment plan as "county policy." Pet. 5; *see also* Pet. 15 (erroneously describing the respondent judges as "the final policy makers of

Tarrant County" (internal quotation marks omitted)). Under article 26.04, appointment plans are adopted by judges, not counties. TEX. CODE CRIM. PROC. art. 26.04(a); *see* Pet. App. 26-28 (court of appeals' rejection of petitioner's argument that Tarrant County could be held liable for actions taken by the respondent judges in their judicial capacities). Both before and after the changes to article 26.04 that the court of appeals described, Texas judges remained responsible for appointing counsel for indigent criminal defendants. Pet. App. 5-7.

REASONS TO DENY THE PETITION

I. THE COURT OF APPEALS' STANDING ANALYSIS IMPLICATES NO CONFLICT AND TURNS ON THE FACTS OF THIS ONE CASE.

The court of appeals explained that, to satisfy the standing doctrine's injury requirement in a case such as this one, "a plaintiff generally must submit to the challenged policy before pursuing an action to dispute it." Pet. App. 10-11. Because petitioner never filed an application under the 2006 appointment plan, the court of appeals held that he lacked standing to challenge that plan, Pet. App. 12, adding that any argument he might have advanced under the futility doctrine would fail. Pet. App. 11-12.

A. Petitioner's arguments that the Fifth Circuit's standing analysis conflicts with this Court's decision in *Goldsmith v. United States Board of Tax Appeals*, 270 U.S. 117 (1926), and the Fifth Circuit's own, earlier

decision in *Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001), Pet. 12, are conspicuously flawed.

1. The Court's decision in *Goldsmith* did not even mention standing, let alone advance a point of law with which the court of appeals' standing analysis conflicts. *Goldsmith* involved the denial of a certified public accountant's application to practice before a tax appeals board. 270 U.S. at 119-20. The Court considered whether the board could exclude advocates from appearing before it based on its rules governing professional qualifications and character. *Id.* at 120-21. Although the Court concluded that the board did have that power, it explained, in *dicta*, that because the accountant met all of the requirements stated in the board's rules, he should have been granted a hearing before his application was denied. *Id.* at 122-23. The Court ultimately denied relief, however, because the accountant never asked the board for a hearing. *Id.* at 123-24.

Even assuming *Goldsmith*'s *dicta* regarding an accountant's right to a hearing could support petitioner's merits argument that he was entitled to a hearing in connection with the denial of his 2005 application under the superseded felony appointment guidelines, it could not support an argument that he had standing to challenge the new, 2006 appointment plan under which he neither applied nor alleged that he would have applied but for its purported unconstitutionality. *See* R.18-19, 24 (Complaint 10-11, 16). As already noted, *Goldsmith* does not address standing at all, so it could not possibly conflict with the court of appeals' standing analysis.

2. Nor does the court of appeals' decision in this case conflict with its earlier decision in *Okpalobi*. Unlike *Goldsmith*, *Okpalobi* did address standing. But it did so in a legally and factually distinguishable context. And as in this case, it concluded that the standing requirement had *not* been met.

a. *Okpalobi* involved a facial challenge to a state statute providing a private cause of action against physicians who perform abortions. 244 F.3d at 409. In the only arguably relevant portion of its decision, the Fifth Circuit considered whether the standing doctrine's causation and redressability requirements could be satisfied even though the defendant officials lacked the power to enforce the statute. *Id.* at 426-27. The court concluded that the plaintiffs could satisfy neither requirement. *Id.* at 427, 429.

Here, the question is whether any of the standing doctrine's requirements, but in particular the "injury in fact" requirement, can be satisfied even though petitioner neither applied under an allegedly unconstitutional plan nor alleged a desire to do so—but chose instead to apply under a different plan that allowed him to receive appointments in a neighboring county. Because the facts relevant to the question of standing in *Okpalobi* and this case are incomparable, and because the court of appeals' standing analysis turned on the absence of any possible injury in fact arising from an appointment plan under which

petitioner never applied, no conflict could arise from the two decisions.[2]

b. But even if there were a conflict between the court of appeals' decisions in *Okpalobi* and this case, that conflict would not warrant this Court's review. Rather, it would be an intra-circuit conflict—and, as such, appropriate for resolution by the court of appeals. *Compare* FED. R. APP. P. 35(a)(1) (providing that *en banc* review "ordinarily will not be ordered unless . . . [it is] necessary to secure or maintain uniformity of the court's decisions") *with* SUP. CT. R. 10(a) (providing that review on certiorari is appropriate where "a United States court of appeals has entered a decision in conflict with the decision of *another* United States court of appeals on the same important matter" (emphasis added)). The court of appeals, however, denied petitioner's request for rehearing *en banc* (which likewise asserted the conflict with *Okpalobi* claimed here, CA5 Pet. for Reh'g *En Banc* 8-10) without requesting a response. Because there is, in fact, no intra-circuit conflict, that disposition was correct.

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2. Petitioner's suggestion that, like *Okpalobi*, this case involves "[a] litigant challenging the validity of a state statute," Pet. 13, is incorrect; his complaint asserted no such challenge. Petitioner also wrongly suggests that he would have standing to assert "the rights of indigent defendants." Pet. 11; *see also* Pet. 12 (stating that "this issue involves a substantial question of constitutional right"). To the extent petitioner has standing at all, he has standing to assert only his own alleged rights as a criminal defense attorney.

B. Beyond the absence of conflict, there is another reason for the Court to deny review of petitioner's first question. The court of appeals' standing analysis turns on the particular facts of this case; it implicates no broad questions of law.

More difficult questions of standing might arise in this context if a would-be attorney applicant either affirmatively refused to sign an application form imposing a purportedly unconstitutional condition or alleged that any application would be futile because rejection was a foregone conclusion. Neither of those questions could arise in this case, however, because petitioner did not allege or argue that he would have applied under the 2006 plan (to which he objected only in theory, on behalf of other attorneys who may have applied or wished to apply, R.24 (Complaint 16)), and he expressly disclaimed reliance on the futility doctrine, *see* Pet. App. 11-12, in both the court of appeals and this Court. Pet. 14; CA5 Pet. for Reh'g *En Banc* 8. Accordingly, this case could not be a vehicle for addressing any question of standing other than the uncontroversial one that the court of appeals decided based on the facts before it.[3]

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3. Although petitioner articulates it only vaguely, Pet. 13-14, any argument for standing based on the text or purpose of the Declaratory Judgment Act would likewise fail. *See Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941) (explaining that jurisdiction under the Act depends on "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment" (citing *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239-42 (1937))).

II. THE JUDICIAL IMMUNITY QUESTION LIKEWISE RAISES NO CONFLICT AND IS LIMITED TO THE FACTS OF THIS CASE.

Petitioner next asserts that the court of appeals' judicial immunity analysis conflicts with the Second Circuit's decision in *Mitchell v. Fishbein*, 377 F.3d 157 (2d Cir. 2004). Pet. 16. It does not.

Mitchell involved an attorney who had been certified on a list of counsel eligible to receive public compensation for representing indigent criminal defendants in New York courts. 377 F.3d at 161. When his renewal application was denied, he sued the volunteer members of a screening committee responsible for determining which attorneys to include on the list, asserting that the denial was unconstitutionally based on his race and his criticism of the allegedly discriminatory selection process. *Id.* at 161-62. The Second Circuit held that quasi-judicial immunity did not protect the members of the screening committee. *Id.* at 174.

For several reasons, there is no conflict between *Mitchell* and the court of appeals' decision in this case. Nor does petitioner's second question—which could at best identify only a misapplication of settled law—otherwise warrant review.

A. 1. In both composition and function, the screening committee at issue in *Mitchell* was notably different from the group of judges at issue here. First of all, the *Mitchell* committee was not composed of judges. It was composed of "volunteers" who "plainly [we]re not judicial officers." *Id.* at 161, 174. For that

reason, *Mitchell* is a quasi-judicial immunity case, *see id.* at 172—not a judicial immunity case, such as this one, in which the decision makers are judges. TEX. CODE CRIM. PROC. art. 26.04(a), (b)(1), (d)(4), (e)(2); R.11-13 (Complaint 3-5).

Second, the *Mitchell* committee had no control over which attorneys New York judges appointed to represent indigent criminal defendants. 377 F.3d at 168. Its function was merely to determine which attorneys, *if appointed by a court*, were eligible to receive public compensation for their services. *Id.* at 168-69, 172. As such, the committee exercised a power that New York judges *lack*. *Id.* at 168 (explaining that, although New York courts have a duty to appoint counsel for indigent criminal defendants, they "do not have inherent authority to provide that an attorney so appointed will be compensated"); *see also Ex parte Virginia*, 100 U.S. 339, 348 (1879) (explaining that, although it was a judge who selected persons eligible to serve as jurors, that function "might as well have been committed to a private person" and "often is given to county commissioners, or supervisors, or assessors").

Because the screening committee's decisions about which attorneys to certify "merely indicate[d] who may . . . receive compensation for appointments that may be made by the courts in the future," the Second Circuit concluded that the committee was acting only as an "administrative aide to the court." *Mitchell*, 377 F.3d at 171. The committee's administrative function was separate from, and had no necessary influence over, the courts' inherent power and duty to appoint counsel for indigent criminal defendants. *Id.* at 168-71.

Because that latter, undisputably judicial function was not at issue in *Mitchell*—but *is* at issue here, *see* Pet. App. 17, 24-26—the two decisions do not conflict.[4]

2. Even assuming, however, that the court of appeals' decision conflicted with *Mitchell*, that conflict alone would not warrant a grant of certiorari. If the Court believes that review may at some point be appropriate in this general area of the law, it should await evidence of a definite split of authority on a clearly identifiable, significant legal question. No such split currently exists.

B. Indeed, petitioner's real assertion is not that the law of judicial immunity is unclear, but rather that it was misapplied in this particular case. In the court of appeals, petitioner conceded, as he must, that the controlling legal question is whether the act complained of is a normal judicial function. Pet. CA5 Br. 19 (agreeing with the district court on this point of law, *see* Pet. App. 39); *see, e.g.*, *Mireles v. Waco*, 502 U.S. 9, 11-12 (1991) (per curiam); *Forrester v. White*, 484 U.S. 219, 227-29 (1988); *Stump v. Sparkman*, 435 U.S. 349, 362 (1978). Although he now attempts to demonstrate confusion by citing additional factors that courts consider in quasi-judicial immunity cases such as *Mitchell*, Pet. 17-18 & n.4 (citing *Cleavinger v. Saxner*, 474 U.S. 193, 201-02 (1985)), he cannot avoid

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4. Although the court of appeals viewed *Mitchell* as authority supporting petitioner's argument, Pet. App. 20, it did so based on an incorrect belief that the *Mitchell* committee was authorized to determine which attorneys were eligible to *receive criminal appointments*. Pet. App. 20, 23. As already noted, the *Mitchell* committee did not have that power. 377 F.3d at 168-69, 172.

either his earlier concession or the weight of authority underlying it.

Petitioner's only attempt to do so is by inaccurately asserting that the Court's judicial immunity decision in *Mireles* has the same precedential value as a one-sentence, summary affirmance. Pet. 18 (citing *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 180-81 (1979); *Edelman v. Jordan*, 415 U.S. 651, 671 (1974)). In fact, *Mireles* is a *per curiam* opinion that lays out the reasons for reversing the lower court's judgment. And its recitation of the relevant law on judicial immunity is uncontroversial—as the opening lines of Justice Stevens's dissenting opinion reflect. *Mireles*, 502 U.S. at 14 (Stevens, J., dissenting) ("In determining whether an action is 'judicial,' we consider the nature of the act and whether it is a 'function normally performed by a judge.'" (quoting *Stump*, 435 U.S. at 362)).

Although the Court has recognized that drawing the line between judicial and nonjudicial acts can be difficult, *Forrester*, 484 U.S. at 227, that observation does not mean that certiorari review is warranted every time a lower court allegedly misapplies the law to the facts before it. In this case, petitioner's challenge to the court of appeals' decision implicates no broad issues of law. He merely disagrees with the court of appeals' understanding of how the Texas statute operates. Pet. 19-20 (challenging the lower court's holistic view of the statutory appointment process and citing authorities irrelevant to the assertion of

conflict). That disagreement is insufficient to support a grant of certiorari.[5]

III. BASED ON BOTH THE COURT OF APPEALS' ANALYSIS AND ALTERNATIVE GROUNDS, THE JUDGMENT BELOW IS CORRECT.

The court of appeals' stated reasoning fully supports its judgment. But because additional grounds exist to support that judgment, the ultimate result in this case would not change if the Court granted review—regardless of how it resolved the questions presented.

A. 1. To establish standing, a plaintiff must allege an injury in fact—that is, an invasion of a legally protected interest held by the plaintiff himself, not some third party. *E.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972). Based on that core constitutional requirement, the Court has explained that a person who never applied for membership in a club lacks standing to challenge its membership policies. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166-167 (1972). Because petitioner neither applied under the 2006 appointment plan nor alleged a desire to do so, that same reasoning applies here. *See* Pet. App. 10-11.

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5. Although petitioner vaguely asserts that the purported conflict between the court of appeals' decision and *Mitchell* "exemplifies similar conflict and disarray on the same issue in some federal district and state courts," Pet. 12, his petition fails to support that claim.

Despite the respondent judges' district-court challenge on this point, petitioner did not seek leave to amend his complaint. Rather, he stood by his original, insufficient allegations. R.255, 260-62 (October 5, 2007 response 7, 12-14); R.334 (November 2, 2007 response 8); R.472, 478-79 (November 20, 2007 response 9, 15-16); R.494-95, 501-02 (November 26, 2007 response 8-9, 15-16). Because standing analysis focuses on the allegations in a plaintiff's complaint, *Allen v. Wright*, 468 U.S. 737, 752 (1984), and because the Court holds the plaintiff to those allegations, *e.g.*, *Sierra Club*, 405 U.S. at 735, 741; *Lujan*, 504 U.S. at 563-64, dismissal was appropriate.

Although the court of appeals went on to address the futility doctrine, Pet. App. 11-12, petitioner has expressly disclaimed any reliance on that doctrine. In both this Court and the court of appeals, he conceded that he "never argued or speculated that he would be rejected if he reapplied" under the 2006 appointment plan. Pet. 14; CA5 Pet. for Reh'g *En Banc* 8. That concession, which underscores the limitations of his complaint, reflects that the court of appeals could not have erred in rejecting any potential reliance on the futility doctrine.

Finally, although the court of appeals did not address it explicitly, possession of a "legally protected interest" is another essential element of injury in fact. *Lujan*, 504 U.S. at 560. Petitioner could have no such interest in the elimination of allegedly unconstitutional provisions of an appointment plan under which he did not apply (nor could he even show a protected property

or liberty interest in receiving publicly funded appointments in criminal cases).

2. a. On the question of judicial immunity, there could be no doubt either that appointment of counsel for indigent criminal defendants is a normal judicial function or that judges, and judges alone, are authorized to make those appointments in Texas. TEX. CODE CRIM. PROC. art. 26.04(b)(1). Petitioner does not argue otherwise. Rather, he asserts that, because the respondent judges' denial of his application for inclusion on the appointment list occurred before any specific case arose in which an appointment was necessary, judicial immunity does not apply. Pet. 20-22.

Petitioner's argument ignores the actual operation of the Texas appointment process. Under Texas Code of Criminal Procedure article 26.04, Texas judges' initial selection of the attorneys who will receive indigent appointments is the critical step. After making those selections, the judges simply appoint the selected attorneys in sequential order as cases arise in their courts. TEX. CODE CRIM. PROC. art. 26.04(a); *see* Pet. App. 63. The only exception to that rule applies if a judge "makes a finding of good cause on the record for appointing an attorney out of order," TEX. CODE CRIM. PROC. art. 26.04(a)—for instance, if the attorney next in line on the appointment list has a personal or scheduling conflict that forecloses proper representation of the defendant in a particular case.

As the court of appeals correctly explained, Pet. App. 24-25, article 26.04 merely accelerates the moment at which judges make a decision about which

attorneys may properly represent indigent defendants in cases that arise in their courts. *See* TEX. CODE CRIM. PROC. art. 26.04(d)(2), (4) (stating that the appointment list shall contain the names of attorneys who not only meet the minimum objective qualifications specified by the judges but are also approved by a majority of those judges for inclusion on the list). Which attorneys should be included on the list—and thus appointed in specific cases—is the substantive, judicial decision about which petitioner complains. And because it is a normal judicial function, that decision is shielded by judicial immunity.

b. Despite petitioner's contention, Pet. 20-21, the Court's decision in *Rothgery v. Gillespie County*—which addressed whether the right to counsel under the Sixth Amendment attaches at an initial hearing even if no prosecutor is present, 128 S. Ct. 2578, 2581 (2008)—does not disturb the court of appeals' judicial immunity analysis. Petitioner's reliance on *Rothgery* depends on the premise that, under article 26.04, judges' approval of counsel to represent indigent defendants has no connection to the appointment of counsel in specific cases.

As already noted, that premise is flawed. The initial decision about which attorneys to include on the list determines which attorneys will be appointed in specific cases. Accordingly, neither *Rothgery* nor Texas statutory and common law requiring a reliable showing of indigence before the right to appointed counsel arises, Pet. 20, poses any threat to the court of appeals' analysis.

B. Finally, even assuming the court of appeals' reasoning were vulnerable to petitioner's criticisms, alternative grounds for affirmance make this case a poor candidate for review. If the Court granted the petition, the respondent judges would further defend the court of appeals' judgment by advancing other grounds raised in, but not reached by, the courts below. *See, e.g.*, *Blum v. Bacon*, 457 U.S. 132, 138 n.5 (1982) (noting that respondents "may rely upon any matter appearing in the record in support of the judgment below"); *Washington v. Yakima Indian Nation*, 439 U.S. 463, 478 n.20 (1979) (explaining that a respondent may "defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals").

Because the court of appeals concluded that lack of standing and judicial immunity barred petitioner's claims, it did not reach several additional arguments—including ones based on legislative, qualified, and Eleventh Amendment immunity and the absence of a state-law property or liberty interest in receiving publicly funded court appointments—that were asserted in the alternative below. If the Court were to grant review, the respondent judges would fully present those arguments and show that the court of appeals' judgment should be affirmed regardless of how the Court might otherwise wish to answer either of the questions presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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